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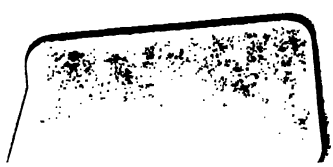

REPORTS

OF

CASES ARGUED AND ADJUDGED

IN THE

Supreme Court of Florida,

AT

TERMS HELD IN 1855.

By MARION D. PAPY, Reporter.

VOLUME VI. No. I.

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JUDGES OF THE SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

HON. THOMAS BALTZELL, CHIEF JUSTICE.

HON. THOMAS DOUGLASS,
HON. CHARLES H. DUPONT, } ASSOCIATE JUSTICES.

MARIANO D. PAPY, ATTORNEY-GENERAL.

JUDGES OF THE CIRCUIT COURTS.

HON. WILLIAM A. FORWARD, JUDGE EASTERN CIRCUIT.

HON. THOMAS F. KING, JUDGE SOUTHERN CIRCUIT.

HON. J. WAYLES BAKER, JUDGE MIDDLE CIRCUIT.

HON. JESSE J. FINLEY, JUDGE WESTERN CIRCUIT.

ERRATA.

For "Henry Anderson," at page 299, read "Henry Henderson."

For "The Supreme Court has authority to entertain an appeal coming up directly from a Justice's Court," at page 303, read "The Supreme Court has *no* authority, &c."

Read head-note No. 2, at page 382, as follows: "In a deed of gift of personal property to the separate use of the wife, having no words of restriction or direction as to alienation, the power of disposition is incident to the ownership, and she may dispose of it as if she were a *feme sole*."

At page 328, for "*jiri*" read "*juri*."

At page 482, for "Daggett vs. Willey" read "Doggett vs. Willey."

On page 304, head-notes, second line, read "the Supreme Court has no authority, &c."

Many other errors, typographical and of punctuation, have unavoidably crept in, but which may be detected by the reader without being specially pointed out here.

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NOTE—The head-notes in each case were prepared by the Judge who delivered the opinion, as required by law.

DECISIONS

OF THE

Supreme Court of Florida

AT

January Term, 1855,

Held at Tallahassee.

FREDERICK R. COTTEN, APPELLANT, VS. HALEY T. BLOCKER, AND JAMES D. TRADEWELL, IN HIS OWN RIGHT AND AS ADMINISTRATOR, &c., OF WILLIAM TRADEWELL, DECEASED, APPELLEES.

1. To constitute a trust or Equitable Mortgage, there must be a specific agreement between the parties in interest, and to be affected by it; there must also be a valuable consideration.
2. The case of Philips vs. Hawkins, 1 Florida, R. 362, commented on and explained.
3. A sale of mortgagee's interest under execution does not confer a complete title to property, but gives the mortgagee's rights subject to redemption by the mortgagor.
4. Notice to creditors to file their claims does not sustain a bar under the statute. The statute should be strictly pursued and its terms complied with

Appeal from a decree of Leon Circuit Court.

It appears from the record that Frederick R. Cotten, on the second day of January, 1844, purchased from James

D., and William Tradewell their plantation and slaves, and other property in Leon County, and took from them a conveyance with general warranty. Three of the slaves purchased, viz: Alfred, Lewis and James, had been on the seventh day of April, 1840, mortgaged to the Southern Life Insurance and Trust Company, to secure the sum of $4200. Of this mortgage Cotten alleges that he had no actual knowledge at the time of the purchase aforesaid, and that the Tradewells represented to him that the slaves so purchased were entirely unencumbered. Subsequently, and on the third day of June, 1850, Cotten ascertaining the existence of the mortgage covering as aforesaid several of the slaves purchased by him, procured by purchase from the Southern Life Insurance and Trust Company, a transfer thereof, together with the bond to secure which it had been given.

It also appears, that on the ninth day of January, 1844, a few days after the sale to Cotten, James D., and William Tradewell had a settlement of their affairs, including the sale to Cotten, by which it was agreed that William Tradewell was still indebted to James D. Tradewell in the sum of two thousand dollars, to which was to be added the sum of one thousand dollars that day advanced, for which two amounts William Tradewell executed his note payable in four equal annual instalments. It was further understood and agreed by the settlement aforesaid, that William Tradewell was "to release the negroes, Alfred, Lewis and "James, sold to Mr. F. R. Cotten, from a mortgage on "them held by the Southern Life Insurance and Trust Com-"pany and is to substitute for them three of his own indi-"vidual negroes, to wit: Moses, Nancy and Charlotte."

It also appears that William Tradewell on the seventh day of April, 1842, mortgaged to James D. Tradewell the

said negroes, Moses, Nancy and Charlotte, with other property, to secure the payment of a bond for the sum of twenty-two thousand dollars, which bond and mortgage were duly recorded in the Clerk's office of said Circuit Court. Neither the original bond nor mortgage was produced at the hearing in the court below, but only copies from the records were read.

It also appears that Haley T. Blocker obtained a judgment in Leon Circuit Court, against James D. Tradewell, and caused the execution which issued thereon, to be levied on the said slaves, Moses, Nancy and Charlotte, which had been mortgaged as aforesaid by said William to James D. Tradewell, and the said slaves were accordingly sold on the third day of February, 1851, the proceeds whereof remained in the hands of the Sheriff to abide the result of this proceeding.

Cotten filed his bill, claiming that the agreement between the Tradewells, of the ninth of January, 1844, by which William Tradewell stipulated to substitute three of his own negroes for three sold to Cotten covered by the mortgage to the Southern Life Insurance and Trust Company, constituted a trust in his behalf, which a Court of Equity should enforce—that the mortgage from William Tradewell to James D. Tradewell, if it ever was valid, was no longer in force, as the debt to secure which it was given, had long since been paid, and therefore, that Blocker could not levy his execution against James D. Tradewell as the holder of a subsisting unpaid mortgage covering the property levied on.

Cotten further claimed, that if it should be decreed that the agreement between the Tradewells aforesaid, created no trust or Equitable lien in his favor, then that as the hol-

der of the bond and mortgage given to the Southern Life Insurance and Trust Company, he is a creditor of the estate of William Tradewell, and entitled to the proceeds of the sale of said slaves, or a pro rata share thereof.

The Defendant, Blocker, insisted in his answer, that the mortgage executed by William Tradewell to James D. Tradewell, on the seventh day of April, 1842, is a subsisting mortgage, the debt to secure which it was given or a part thereof, being still due and unpaid; and that as the condition of the said mortgage had become forfeited he was entitled to levy his execution against James D. Tradewell on the property embraced therein.

Blocker also insisted, that James D. Tradewell was a creditor of the estate of William Tradewell, and that he was entitled to claim in a Court of Equity, the application to the debt due him by James D. Tradewell, of the pro rata share, which James D. Tradewell would be entitled to receive out of the estate of William Tradewell. He also insists, that Cotten failed to present his claim against the estate of William Tradewell until it was barred by the Statutes of this State.

A witness was examined as to the value of the negroes, Alfred, Lewis and James, and also of Moses, Nancy and Charlotte who testified that the value of the three first named, at the date of the settlement between the Tradewells was about four hundred dollars more than the value of the three last named.

The court below, dismissed the Bill with costs, and Cotten appealed.

M. D. Papy for Appellant.

D. W. Gwynn and W. Call for Appellee, Blocker.

BALTZELL, C. J., delivered the opinion of the Court.

William Tradewell and James Tradewell on the second

day of January, 1884, sold to F. R. Cotten their plantation and slaves, and other property, conveying the same with general warranty. A portion of the slaves, consisting of negroes Lewis, Alfred and James, by mortgage, bearing date seventh April, 1840, had been conveyed to the Southern Life Insurance and Trust Company, by Wm. Tradewell to secure payment of the sum of $4200. On the ninth of January, 1844, the Tradewells had a settlement of their affairs and agreed amongst themselves that Wm. Tradewell should "release these negroes from the mort-"gage aforesaid and substitute for them three of his own "negroes, Moses, Nancy and Charlotte." This agreement was never executed on the part of Tradewell, nor was the mortgage paid, but Cotten, to save himself, bought the Bank mortgage and took an assignment to himself. Negroes, Moses and others were levied upon at the instance of Haley T. Blocker, a judgment creditor of James Tradewell, and the proceeds of the execution being in the hands of the Sheriff, it was agreed that they should abide the result of a suit instituted by Cotten. He accordingly filed his Bill, setting up the facts aforesaid, and claiming to have an Equitable lien, or mortgage, or trust upon this property, the negroes, Moses, Nancy and Charlotte, by virtue of the agreement between the Tradewells, made in his favor, or at all events, that his claim as a creditor of Wm. Tradewell by virtue of the assignment of the mortgage aforesaid, be allowed pro rata out of the said fund. After a hearing of the case upon the pleadings and exhibits, the court dismissed the bill, and Cotten has appealed to this court.

We agree in opinion with the court below that this agreement of Wm. Tradewell, cannot be regarded as a lien or mortgage in favor of Cotton. It is scarcely more indeed

than the expression of a design on his part to do something. To effect the substitution of property in place of that mortgaged, requires a new mortgage, with the forms and requisites of a new contract. In the first place, there must be execution on the part of the mortgagor; in the next place acceptance on the part of the mortgagee. In addition to this, a release of the property, to be taken from the mortgagee. To carry out the designs of the parties, Wm. Tradewell should have mortgaged the negroes, Moses, Nancy and Charlotte, to the Life Insurance and Trust Company. They should have released the negroes, Alfred, Lewis and James. By this means the substitution proposed, would have been brought about. But Wm. Tradewell never moved in the matter, for anything appearing in the record, and from the testimony of one of the witnesses, the Bank with propriety could not have accepted the proposition as the negroes proposed to be substituted, were not worth as much as the others by four hundred dollars. Undoubtedly the effect of treating it as a mortgage, would be to give the Bank a double mortgage, or to add three more negroes to its security without any gain on the part of the Tradewells, and without any approval or consent of theirs expressed to the Bank; in other words, without an agreement to that effect, on their part, with the Bank. These remarks are applicable to the case of Cotten, after his assignment of the Bank mortgage. By it he stands in no better position than the Bank. He has its rights and no more.

The question arises yet, whether a trust was created by this agreement in favor of Cotten. It is very clear if it had been carried out as contemplated, it would have enured to his benefit, by releasing negroes he had bought and which were subject to the mortgage of the Bank. And certainly, if such a result can be brought about consistent-

ly with principle, it would be greatly desirable. The difficulty lies in the complexity of the subject, as already explained. The agreement is not with Cotten, and depended for its execution not upon thc Tradewells, but upon a third party—the Bank. And it cannot otherwise be regarded than in connection with the Bank. It does not admit or declare an obligation to Cotten, such as would be the effect of declaring a trust for him. If Tradewell had so designed, he would have agreed directly with Cotten, and given to him these negroes as a protection against the Bank mortgage, and authorized him to use them as such, or declared that he held them in trust to indemnify Cotten. But he does nothing of the kind. In a private agreement between himself and brother, not communicated to Cotten, he engages to effect the arrangement himself and using his own time, means and opportunity.

There are several objections to the enforcing the agreement as a trust on the part of Cotten.

1st. He was a stranger to the agreement. It remained with the author of it and was not acted upon to the time of his death, which is a strong circumstance against it. Hill on Trust., 85; 12 Vesey, 39; 2 Mallory, 267.

There was no consideration proceeding from him. It is true there was a warranty in existence, but that was an executed agreement some nine days previous, and there was nothing new to call this agreement into action. The covenant to warranty was a past consideration. A valuable consideration is requisite to put the court in motion. Hill on Trust., 83, Note. There was nothing distinct and perfect, complete and unequivocal in the agreement, but on the contrary a design incapable of execution, and imperfect. Hill on Trust., 87; 1 Mad., 176; 3 Brown Chy., 12; 8 Sim 324,

The following principles are given as the result of the authorities in application to voluntary trusts: "A *clear* declaration of trusts contained in, or accompanying the deed which passes the legal estate, will create a perfect executed trust, and will be established."

"A clear declaration or direction by a party, that the property shall be held in trust for the object of his surety, though unaccompanied by a deed or other act divesting himself of the legal estate, is an executed trust and will be enforced."

"If a party having the equitable interest of property, execute a formal instrument directing the trustee in whom the legal interest is vested, to hold in trust for a volunteer, and this direction is accepted and acted upon by the trustee, that is an executed trust." Hill on Trustees, 88—9.

The party having failed to declare a trust to Cotten, or to create an interest in his favor, by certain and definite expressions, it is not for the court to remedy the defect. We have no option left, but to declare the act as the expression of a design, laudable in its character, and which should have been carried into execution, but which is not in the rightful power of the court to enforce. It is proper to state that we have examined with proper care the authorities submitted to us, but do not find them to sustain the principles contended for.

While Cotten then has not an equitable claim or trust, he is yet a creditor of Wm. Tradewell, by virtue of the assignment of the Bank mortgage, and as having released the incumbrance on the estate purchased from the Tradewells. This he is entitled to, unless indeed he is excluded, by not having filed his claim with the administrator of Tradewell. The evidence on this point is too vague and indefinite to sustain the objection. The advertisement is

not given, nor is the statute pursued in other respects, as in the case of Laverty vs. Filyaw. To make the objection available, the statute should be strictly pursued. The bill then should have been retained to adjudicate these rights of Cotten, as a creditor of William Tradewell.

We have now to consider the claim of Blocker. It is based upon a sale under execution of the interest of James Tradewell, as mortgagee of Wm. Tradewell, by deed dated tenth April, 1842, to secure payment of $22,000 in annual instalments of $2,750 each, payable in 1843, '45, '46, '47, '48, '49' and 50. Under the idea that these instalments, or some of them, were unpaid, the mortgagee's right was levied upon under the ruling of this court, in the case of Phillips vs. Hawkins, 1 Florida Reports, 362. It has been erroneously supposed, that a sale of the right of a mortgagee under this decision, would vest the complete title in the purchaser, and the misapprenhension, was led to the consideration of the decision, as neither founded in law nor supported by the authority of other courts. In the first place the ruling does not conflict in the slightest degree with the right of the mortgagor to redeem after the sale 4 Howard, 101; 8 Johnson, 96; 12 Wendell, 61; 1 Brevard, 286; 9 Porter, 472; 7 Monroe, 384. As to the rule itself, the difficulty is to find an adverse opinion on the part of the English or American Judges. The Supreme Court of the United States, in the case of Kenzie vs. Bronson, say: "according to the long settled rules of law and equity "in the United States, in all the States whose juris- "prudence has been modelled upon the principles of the "common law, the legal title to the premises in question "vested in the complainant, upon the failure of the mort-

"gagor to comply with the conditions contained in the mort-"gage, and at law he had a right to sue for and recover "the land itself." 6 Howard, S. C., 311.

The Supreme Court of Mississippi, say: "the mortgagee "of personal property, immediately on the non perform-"ance of the condition, is regarded as absolutely owner of "the property mortgaged." 4 Smde. & Mar. 153.

The Supreme Court of New York say: "a mortgage is "an immediate sale to the mortgagee, with the privilege of "the mortgagor to redeem." 3 Cow., 174.

To refer to the numerous adjudications in the States on the precise question, would swell this opinion to an unreasonable length. In addition to those cited in Phillips vs. Hawkins, we add the following: 1 Bailey, S. Car., 527; 1 McCord's Chy., 489; 1 Harper, 275; 9 Porter, 474; 5 Ala.; 6 Shepley, 357. Commentators and writers of distinction on the law, concur in the same opinion. Thus: "a mortgage of personal property is a conditional transfer or conveyance of the property itself, and if the condition is not duly performed, the whole title vests absolutely at law in the mortgage, exactly as it does in a mortgage of lands."

1 Story's Eq. Jur., 372 § 1030.
Story on Bailments; 4 Kent 138—9.
Coote on Mortgages "
2 Hilliard " 344.

It is proper to say, we have been informed that a different practice prevails in the State of Georgia, and it is probable this fact has led to the general misapprehension prevailing on the subject. If the property mortgaged, on the failure of the mortgagor to perform the condition by paying the debt due by the very terms of the contract, becomes at law, the property of the mortgagee, what is there to ex-

empt it from the payment of his debts by execution? The reference to authorities in the case of Phillips vs. Hawkins, shows that this is done elsewhere, in accordance with authority, and we see nothing in our statutes, or in principle to prevent the operation of the rule here.

We have said that the sale of the interest of James Tradewell as mortgagee, conferred upon the purchaser under the execution, not the absolute right to the property, but his right and interest, as if he had assigned the mortgage himself, instead of having it sold by the Sheriff.—Blocker is then the assignee, and stands in the place of James Tradewell. The mortgagor, Wm. Tradewell, and his representatives have the right of redemption by paying up the amount due. This is the position which Blocker occupies to the property, and the case being in equity, and all the parties before the court, it may well ascertain the extent and value of this interest. The mortgage is complained of as fraudulent. Whilst there are circumstances about it, not altogether satisfactory to us, yet we prefer that this matter be ascertained by the Judge below on a new hearing, with the assistance of a jury, if deemed prudent and necessary. The original bond should be produced if to be had. It seems that the bond is very nearly, if not wholly paid; if this be the fact then Blocker has no rights under his execution, whatever may be his rights as a creditor of Wm. Tradewell.

Whilst then we concur with the Circuit Court as to the equities of Cotten, under the agreement of Wm. Tradewell, we differ as to the absolute dismissal of the bill. It should, in our opinion, have been retained as a creditors' bill, and be proceeded with accordingly. The decree is, therefore, reversed and set aside with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

JOHN H. RHODES, PLAINTIFF IN ERROR, VS. W. P. MOSELEY, DEFENDANT IN ERROR.

1. Notice should be given to the party in interest, of an application to establish a lost paper.

2. An officer of the court has no right to use the names of the parties to an application of his own for such purpose.

For a statement of the facts reference is made to the opinion of the court.

Archer & Papy for plaintiff in Error.

W. Call for Defendant in Error.

BALTZELL, C. J., delivered the opinion of the court.

The Sheriff of Leon county made an affidavit, alleging that a writ of fi. fa., issued by the Clerk of the Circuit Court to the Sheriff in favor of Wm. P. Moseley vs. John H. Rhodes—that the original, of which a copy was in his possession, has been lost or mislaid, a copy of which he attaches to his affidavit:

At the October Term, 1853, the following entry was made:

William P. Moseley, Plaintiff, vs. John H. Rhodes, Defendant. } On petition of Sheriff to establish lost execution.

"It appearing to the court from the petition and accompanying papers filed by the Sheriff of Leon county in the case, that a pluries writ of execution was issued from the Clerk's office, and that the said writ was lost or mislaid, &c.

"It is therefore ordered, that the said copy be establishlished in lieu of the original and be valid for all purposes for which the original writ of execution would have been."

It has not been denied that the court has power to establish lost papers, but the action complained of in this instance is that no notice was given.

Another irregularity is evident, that the Sheriff has no

power to originate motions or present questions in the name of the parties, for the action of the court. The parties themselves are alone competent to this duty.

The petition should be theirs and in the form of an application, with notice to the adverse party. We are satisfied that the irregularity escaped the attention of the learned Judge who presides in that court.

The order will be set aside, with leave to the parties to renew their motion in a proper manner.

L. A. HARDEE & CO., APPELLANTS, *vs.* GEORGE LANGFORD, APPELLEE.

1. The provision contained in the 4th paragraph of the 3rd Section of the Act of 1834, (Thomp.Dig., 370,) which requires that "the evidence shall be confined strictly and exclusively to the state of facts alleged in the plaintiff's affidavit,as they existed at the time of issuing the attachment" has reference only to cases *pending* at the time of the passage of the act.
2. The decision in the case of Kennedy vs. Mitchell,(4 Florida R. 457,) which is an adjudication upon the proviso contained in the 5th paragraph of the same section, referred to and approved.
3. It is a general rule to be observed in the construction of statutes that where they provide extraordinary remedies, they should be strictly construed. But in view of the fact that there exists no provision for "*special bail*" in this state,that rule may be somewhat relaxed in its application to the attachment laws, whenever by so doing the cause of justice may be advanced.
4. A debtor may by his declarations of intention,or avowal of design, in regard to the *fraudulent* disposal of his property,bring himself as effectually under

the operation of the statute, as by the commission of any overt act, either consummated or in progress of consummation.

5. It is a safe rule to be adopted in respect to the admission of evidence on the trial of the issue of *fraud or no fraud*, arising under the attachment law, that the evidence whether consisting of overt acts, or mere declarations of intention, shall not have transpired at so remote a period as to prevent their becoming a part of the *res gestæ*, and the determination of this, must be left to the sound discretion of the Judge, presiding at the trial of the issue.

Appeal from the Circuit Court of Columbia County, Hon. J. J. Finley presiding.

This was an action of assumpsit instituted by appellants by attachment. The ground alleged in the affidavit on which the writ of attachment issued, is "that the said George Langford is fraudulently disposing of his property for the purpose of avoiding the payment of his just debts."

The defendant Langford afterwards made affidavit, declaring the said allegation of the plaintiff upon which the writ of attachment issued, to be untrue.

Previous to the trial of the issue thus joined, the plaintiffs moved a continuance of the cause, based on an affidavit, alleging that "John B. Smith is a material witness for them, and that they could not safely go to trial without the testimony of said witness; that said witness has been subpœnaed and is not absent by the consent or procurement of plaintiffs; that they expected to be able to prove by said witness that the defendant proposed to said witness to claim his (defendant's) horse, to prevent said horse being taken for defendant's debts, and that said proposition was made to said witness but a few days or a week before the attachment was commenced, and that the affidavit was not made for the purpose of delay." The court over-ruled the motion, to which over-ruling, plaintiffs by their counsel excepted.:

On the trial of the cause, the plaintiffs introduced as a witness, Wiley Langford, who was asked: did the defend-

ant offer to dispose of his property at or about the time the writ of attachment issued? To which he answered: "that about three weeks before or more, defendant offered to sell him a horse." The court then refused to allow him to testify any further in reference to the offer to sell the horse to witness at that time, to which the plaintiffs excepted.—Plaintiffs' counsel then asked the witness: "What did defendant say at that time was his intention in attempting to dispose of his property? The court over-ruled the question and plaintiffs' counsel excepted. Plaintiffs' counsel then asked witness to state what defendant said about disposing of his buggy; to which he answered: "on the same evening that defendant bought the buggy of plaintiffs', he, witness, had a conversation with defendant about the disposition of his horse." Plaintiffs' counsel then asked witness to state what he knew about plaintiffs' going out to defendants to purchase a horse." Witness answered that "two or three weeks before the writ of attachment issued Goodbread, one of the plaintiffs, went to defendant to purchase a horse." Plaintiffs' counsel then asked witness what took place at that time between plaintiffs and defendant; the court overruled the question and plaintiffs excepted.

The jury having found the issue in favor of the defendant, judgment was rendered accordingly, and plaintiffs prayed an appeal. Appellant assigned the following errors.

First; The court erred in refusing a continuance.

Second; The court erred in refusing to let witness testify further as to what took place three weeks or more before writ issued.

Third; The court erred in refusing to allow witness to testify in answer to the interrogatory as to the intention of

defendant in disposing of his property, it being three weeks or more before writ issued.

Fourth; The court erred in refusing to allow witness to testify as to what took place between plaintiffs and defendant two or three weeks before attachment writ issued, at the time plaintiff Goodbread went to defendant to purchase a horse.

DUPONT J., delivered the opinion of the court.

This case comes up from the Circuit Court of Columbia county, and should properly have been heard at the last term of the court held in Jacksonville, in the Eastern Judicial District; but upon the application of the Counsel and for their accommodation, we have consented to have it docketed and heard at the present term in the city of Tallahassee.

The point in controversy arose upon a motion to dissolve an attachment which had been sued out by the plaintiffs, and levied upon the property of the defendant. The ground set forth in the affidavit and upon which the writ was issued is, that "the said George Langford is fraudulently disposing of his property, for the purpose of avoiding the payment of his just debts;" and is in due form and in strict accordance with the terms of the Statute.

The Statute provides, that "such writ shall in no case be issued, unless the party applying for the same, or his Agent or Attorney shall first make oath in writing, that the amount of the debt or sum demanded is actually due, and also that the party from whom it is due, is actually removing out of the State, or resides beyond the limits thereof, or absconds or conceals himself or is removing his property beyond the limits of the State, or secreting or fraudulently disposing of the same, for the purpose of avoiding

the payment of his just debts." Vide Thomp. Dig., 367, Sec. 1, Par. 2.

At page 369 of the Digest, Sec. 3, Par. 3, it is further provided, that "the courts respectively to which such attachments are returnable, shall be always open for the purpose of hearing and determining motions for dissolving such attachments; and in such cases, upon oath made and tendered to the court, that the allegations in the plaintiff's affidavit are untrue, either as to the debt or sum demanded, or as to the special cause assigned, whatever it may be, for granting the attachment, then in every such case, it shall be the duty of the court to hear evidence upon the issue so presented, and if in the opinion of the court, the allegations in the plaintiff's affidavit are not sustained and proved to be true, the said attachment shall be dissolved: *Provided,* that if the party defendant shall demand the same, a jury shall be empanelled to try the issue joined as aforesaid."

The statute also provides for the issuing of writs of attachment in cases where the debt may not have become due, but as that provision is not applicable to this case it is unnecessary to advert to it. Under the provision last cited, the defendant at the term of the court to which the writ had been made returnable, filed his affidavit, alleging therein, that the ground as set forth in the affidavit and upon which the writ of attachment had issued, to wit: "that he the defendant, George Langford, was at the time set forth in the plaintiff's affidavit, fraudulently disposing of his property for the purpose of avoiding the payment of his just debts," was untrue. Issue was thereupon joined, and a jury empanelled to try the same; who having heard

the evidence and considered upon their verdict, "returned that the defendant was not fraudulently disposing of his property to avoid the payment of his just debts," and judgment was entered accordingly.

The first error assigned is, "that the court erred in refusing a continuance." At common law, the granting or refusing of a continuance, is a matter exclusively within the discretion of the *nisi prius* Judge and not examinable upon writ of error. But our statute (Pamphlet Laws 100, Sec. 1,) has altered the practice in that particular, and that matter may now be assigned for error in any proceedings occurring in the courts of our State (Vide Dawkins vs. Carrol, 5 Fla. Rep., 407.) It appears by the record that the plaintiff moved the court for a continuance of the case to the next term, and based his motion upon the usual affidavit; and in order to determine upon the propriety of the ruling, it becomes necessary to refer to the contents of the same.

The affidavit is drafted with skill and precision and contains all the usual requirements. It is based upon the absence of a material witness, and sets forth fully and clearly the facts expected to be testified to, by said witness, as follows: "that he expected to be able to prove by said witness, that the defendant proposed to said witness to claim his (defendant's) horse, to prevent said horse from being taken for defendant's debts; and that said proposititon was made to said witness but a few days or a week before the attachment suit was commenced."

Had it not been for the point made in the argument, we should have been at a loss to discover the ground upon which the ruling of the court below, refusing the motion for continuance was based, for it appears to us that the af-

fidavit, was ample and sufficient for the attainment of the object contemplated.

The counsel for the Appellee, cited Thomp. Dig., 370, Sec. 3, Par. 4, and founding an argument upon the peculiar phrasology of that paragraph, contended that the affidavit was insufficient in this—that it did not show that the matter of fact to be testified to, *transpired at the date of the affidavit* upon which the writ of attachment was issued, but that it did show affirmatively, that the fact, if it did occur, transpired several days prior to that date. That the terms of the statute are peremptory, that "on the trial of any such motion, the evidence shall be confined strictly and exclusively to the state of facts alleged in the plaintiff's affidavit, *as they existed at the time of issuing the attachment;*" and consequently, that the ruling, refusing to grant the continuance, was correct, as the Judge would have been bound; by this peculiar provision of the statute, to have rejected the evidence when offered, upon the ground of irrelevancy.

It is a sufficient answer to this argument, to state, that the statute is of no force in this case, having expired by the terms of its own limitation, long anterior to the time at which the writ of attachment was sued out.

The language of the statute is as follows: "In all cases of attachment now pending before the courts of this State, motions may be made, and shall be heard and decided, for dissolving the same, in the manner directed in the last preceding section of this act; but on the trial of any such motion the evidence shall be confined strictly and exclusively to the state of facts alleged in the plaintiff's affidavit as they existed at the time of issuing the attachment."

Now it is perfectly obvious that the language of the act provides for and limits its operation exclusively to *cases*

which were pending before the court at the date of the enactment. The words are : "in all cases *now pending* before the courts of this State."

If language affords any index of intention, it is perfectly evident that the Legislature could not have selected words more significant of their purpose. Nor do we perceive that the argument gains any advantage or benefit, by invoking the *Spirit* of the act, for in the very next succeeding paragraph, (Par., 5,) provision is made in regard both to suits *thereafter to be commenced, and to suits then pending.* And in regard to the correct interpretation of the latter paragraph, if there was ever any doubt as to the intention of the Legislature, that doubt has been removed by an authoritative exposition of the same, in the adjudication of the case of Kennedy vs. Mitchell, (4 Fla. Reps., 457) in which the point now under consideration arose, and was expressly decided.

Justice Semmes, in delivering the opinion of the court, in that case, says: "It is insisted, however, by counsel, that, under the proviso to this section of the act, (Par. 5,) the motion to dissolve the attachment, must be made at or before the first term of the court to which the suit is brought, in order that a dissolution of the attachment shall operate as an abatement of the suit and authorize the court in dismissing it. We are of a different opinion. It is very manifest that the proviso refers to the latter clause of the 5th Article of the Act, having reference to causes *then* pending and restricted the motion to dissolve, not only to such causes, *but* to the first term of the court *after* the passage of the law; whereas, the first clause of the same Article, providing for the dissolution of attachment before and after plea to the action, has reference exclusively to suits *thereafter* to be commenced."

The Judge, in commenting upon the peculiarity of the provision, remarks: "To give this statute a different construction, would be at variance with its letter and spirit, and render its provisions inconsistent and contradictory; and however much it is to be regretted that this special legislation in reference to cases then pending before the courts, should have been resorted to, yet it is not the province of this court to extend the operation of the act to cases not contemplated by the Legislature."

The present members of the court cordially concur with their respected predecessors, in the expression of their regret that our Statute Book should ever have been soiled by legislation of so viscious and corrupting a character. But while they have thus given expression to their just indignation, a due regard for the character of the State, makes it proper to remark, that this singular statute owes its parentage to our former Territorial organization, having been enacted in 1834, a period of eleven years anterior to the organization of our State government. It is very manifest from the concurrence of these two sections, embraced in the same act, that it was the *intention* of the Legislature that their provisions should have reference and be applied to causes *then pending* at the date of its passage; and it is not for this court, however much it may condemn the motive, to disregard that intention, by giving to them a more extended operation. The argument then, predicated upon the phraseology of the said fourth paragraph of sec. 3, entirely fails, and we are to consider the motion for the continuance, based as it is upon the contents of the plaintiffs' affidavit, as though that provision had never been incorporated into the act.

Considered in this light, two questions are prominently

presented for our decision. First, the *character* of the evidence necessary to convict a defendant of making "a fraudulent disposition of his property, for the purpose of avoiding the payment of his just debts;" and secondly, the particular *time* to which this evidence shall be limited.

In regard to the first point, we are of opinion, that the declarations of a party, deliberately made, afford the most potent evidence of his intention—the evidence thus furnished being ordinarily more conclusive than that derived from overt acts, for the latter may often be misinterpreted, while the former will rarely be misunderstood. Thus to apply this doctrine to the case before us: Supposing that the witness when produced, would testify as deposed to by plaintiff in his affidavit. He says in his affidavit for a continuance that "he expects to be able to prove by said witness that defendant proposed to said witness, to claim his (defendant's) horse, to prevent said horse from being taken for defendant's debts;" and that said proposition was made to said witness but a few days or a week before this attachment suit was commenced." Here the proposal to place the property into the possession of another and the avowal of the *motive* is distinctly made, and had the proposal been acceded to, the fraudulent disposition of the property, against which the statute intended to provide, would have been fully consummated, at least so far as the act of the defendant could have effected that purpose. Now when called upon to interpret this transfer of the possession of the property, no one could doubt the *fraudulent* character of the act, when coupled with the *avowal of the motive.*— But had there been a simple transfer of the possession by sale or otherwise, and no declaration of motive made, there might have arisen some doubt as to whether it was

made with a *fraudulent* intent, or *bona fide.*

But it has been contended by some who have essayed to construe this clause of the statute, that it never was the design of the Legislature in making this a ground of attachment, to act upon the *intention* of the debtor, but there must exist some overt act, either in the progress of consummation, or already fully consummated. To give the clause such a construction, we think would be effectually to nullify it, and to render its operation wholly nugatory, for it would inevitably happen, that in the great majority of cases, the issuing of the writ after the "fraudulent disposal" of the property had been consummated, would produce no beneficial result. We are aware of the rule which requires that a statute providing extraordinary remedies should always be strictly construed, but while we fully recognize the authority of that rule, we are reminded that the ordinary remedy of *"special bail,"* afforded in England for the protection of the creditor, has been entirely abolished, or rather never existed in this State, and that the nearest approximation which he has to an efficient protection, is to be found in the provisions of the attachment law; consequently there would seem to be a propriety in relaxing somewhat, the stringency of the rule, when applied to the construction of these statutes, whenever by so doing, the cause of justice may be advanced. From what we have said on this point, it will be perceived that the conclusion to which we have come is, that a debtor may, by his *declaration of intention,* or avowal of design, as effectually bring himself under the operation of this clause of the statute, as he would by any overt act, either consummated or in progress of consummation.

We now address ourselves to the consideration of the

second point of enquiry, viz: "The *point of time* to which such evidence shall be limited." In determining this question, we think it a safe rule to be adopted, that the evidence, whether consisting of overt acts or mere declarations of intention, shall not have transpired at so remote a period as to prevent it becoming a part of the *res gestæ;* and to determine this, the Judge who presided at the trial must exercise a sound discretion, being governed in his conclusions by the attendant circumstances.

Applying the rule to the case before us, we do not think that a "few days" or even a "week," or more, (as was proposed to be deposed to by the absent witness,) anterior to the suing out the writ of attachment, constituted such a remoteness of time, as *of itself,* ought to have excluded the evidence on the ground of irrelevancy; and we feel assured that had the learned Judge who presided at the trial, not been led astray by having his attention directed to the peculiar phraseology of the 4th paragraph of the 3rd article, before referred to, he would not have hesitated to have granted the continuance prayed for, upon the showing contained in the affidavit of the plaintiff. Deeming the causes set forth, amply sufficient to sustain the motion for the continuance, we therefore sustain the first assignment of error.

As the judgment must be reversed upon the view we have taken of the error first assigned, it seems unnecessary to go into a critical investigation in regard to the remaining assignments. It may suffice to remark that the views already expressed will apply with equal force to them.

We have given the greater attention to the consideration of the point involved in this case, from the fact that it must frequently arise in practice; and from the further consider-

ation, that the process of attachment furnishes the most efficient, and almost only protection to creditors, against the fraudulent attempts of dishonest debtors.

The judgment of the Circuit Court will be reversed with costs.

EVERITT W. SEALEY, APPELLANT, VS. WILLIAM C. THOMAS AND WIFE, EXECUTOR AND EXECUTRIX OF J. B. PAGE, DECEASED, APPELLEES.

1. The doctrine that a "personal action once in suspense by the act of the party entitled to it, is always extinguished,"—questioned.
2. If an executor or administrator receive assets of the estate, sufficient to satisfy his debt due from the testator or intestate, this, at *common law*, operates an extinguishment of his demand.
3. But the provision of the statute, which takes away the right of retainer in cases of *insolvency*, so far modifies this doctrine as to confine its operation exclusively to solvent estates.
4. When a defendant sets up as a bar to the action that the plaintiff in the character of executor had received assets sufficient to satisfy his debt, it is neither necessary nor proper, *that* the *plea* should allege, that the estate was solvent; but if an insolvency is relied upon to bring the base within the operation of the statute, the fact should be distinctly avered in the *replication* by way of avoidance.
5. It is the first essential of good pleading, that it be characterized by *certainty*, and this quality is especially requisite in the replication.

The opinion of the court embodies a full statement of the

facts presented by the record, to which reference is made.

W. Call, for Appellant.

J. Erskine, for Appellee.

DUPONT, C. J., delivered the opinion of the court.

The record before us presents the following state of case. The appellant instituted his suit against the appellees, as executor and executrix of John B. Page, deceased, in the Circuit Court of Jefferson county, and at the April term, A. D., 1853, of said court, filed his declaration in an action of assumpsit. The declaration is in the usual form, containing the indebitatus count for work and labor—goods sold and delivered, together with the several money counts.—On the 12th day of July, A. D. 1853, the defendants filed their plea of *non assumpsit,* upon which issue was joined. And again, on the 10th day of November, A. D., 1853, they filed other special pleas, which upon motion were stricken out, for the reason, we presume, that they had not been filed within the time prescribed by the rules of court.—At the same time the parties went to trial upon the general issue, and a verdict was rendered for the plaintiff. The defendants thereupon moved in arrest of judgment, which motion prevailed and a *venire de novo* awarded, with leave to both parties to amend their respective pleadings.

At the next ensuing term, the plaintiff filed his amended declaration and the defendants filed two additional pleas, numbered 4 and 5, respectively. No. 4 states by way of inducement, that the testator, Page, had appointed the plaintiff and his widow, Sarah C., executor and executrix of his last will and testament. who were duly qualified, and assumed the duty of the administration. That Sarah C., afterwards intermarried with the defendant, William C., who thenceforth became executor in right of his wife,

and concludes with the averment, that a large amount of assets belonging to the testator came to the hands of the said plaintiff as executor, and to the hands of the said plaintiff and the said Sarah C., as such executor and executrix before her said intermarriage. Plea No. 5, is a common plea of payment, concluding with a verification, and seems to have been abandoned in the further progress of the cause, as there is no replication to the same nor any further notice taken of it in the record of the proceedings.

The 4th plea the plaintiff demurs generally, and sets forth (under the rule,) as special grounds of demurrer:—1st, That the plea does not allege that the estate of the testator was *solvent.* 2nd, That it does not allege that there was a sufficiency of assets in the hands of the executor to pay his debt, *after paying all preferred debts.* 3rd, That it does not allege that plaintiff *did retain.* 4th, That at the time said supposed right of retainer attached, said plea does not allege, either "that legal notice had been given, that two years had elapsed, or that all preferred debts has been paid. And 5th, That the plea is uncertain, informal and in other respects insufficient.

Upon the argument of this demurrer, the court overruled the same, and thereupon the plaintiff filed his replication.

The replication admitting and confessing the matters of inducement as set forth in the plea, "avers that he, plaintiff, did not retain the whole or any part of said indebtedness out of said assets, and that he was afterwards, to wit: on the day discharged as executor from said estate, without retaining or being allowed the same," and concludes with a verification. To this replication the defendant filed a general demurrer, which was

sustained by the court and judgment thereon was accordingly entered for the defendant.

From several rulings of the court, the plaintiff has excepted and assigned the following errors, viz:

1st. That the court erred in overruling plaintiff's demurrer to defendant's fourth plea; and—

2nd. That the court erred in sustaining defendant's demurrer to plaintiff's replication.

The demurrer to the plea raises the question as to the right and duty of an executor or administrator to retain out of the assets which may come to his hands, for a debt due to him from the testator or intestate, and its consequent [illegible]. The doctrine on this subject is derived from the common law of England, and whatever diversity of opinion may exist as to its origin, and the reason upon which it is based, there seems to be none as to its universal recognition in the English courts.

[illegible] we propose to look at this doctrine which seems to have been so firmly established, and the right to [illegible] and the consequences of that right—the [illegible]

[illegible]

property is as strongly altered as it could be by recovery and execution."

Holt, C. J., in Wankford vs. Wankford, reported in Salk, 299, lays down the doctrine thus, "if the obligor make the obligee or the executor of the obligee, his executor, this alone is no extinguishment, though there be the same hand to receive and pay; but if the executor has assets of the obligor, it is an extinguishment, because then it is within the rule, that the person who is to receive the money is the person who ought to pay it; but if he has no asests, then he is not the person that ought to pay, though he is the person who ought to receive it; and to that purpose is the case of 11 Hen., IV 83, and the case of Dorchester vs. Webb Cro., 372."

In the case of Plowden above referred to, it is also assigned as a ground for the doctrine of extinguishment, that by the merger of the character of creditor into that of executor or administrator, the *right of action* for his debt is gone, and that "a personal action once in suspense by the act of the party entitled to it, is always extinguished."

This position in regard to the non-revival of a personal action once suspended, seems also to have been recognised and sanctioned in the case of Smith vs. Watkins, 8 Humphries R., 341; and also in the case of Page vs. Patton, et al.; 5 Peters S. C. R., 313, cited by the counsel for the appellees. But with the utmost deference for such high authority, we are inclined to doubt the correctness of the position as a principle of law, for it is not universally true, that a personal action which has been once suspended, may not again be revived. The case of a *feme* losing by covcrture her right to sue for a chose in action during the life of her husband, and the revival of that right after his death

if he had not reduced it into possession, is one amongst many familiar instances, which go to prove the unsoundness of the position.

From the examination which we have given this subject, it is very clear to our minds, that the only rational ground upon which the doctrine of *"extinquishment"* as contro-distinguished from that of "retainer," can be placed is, that it is a mere *presumption,* that as the executor has in his hands the entire assets of the estate, and is authorized to appropriate them in the payment of debts, he will not fail to give his debt the preference over all others of an equal degree. If then we are correct in this view, it seems exceedingly strange and unaccountable, how it should ever have come to be decided, that the executor should be denied the right to rebut this presumption by proof. It is to be accounted for only for the great favor which legal presumptions found with the early common law Judges. And were it now a question of first impression of one not closed by an almost unbroken current of English and American adjudications, we are free to say that we should be disposed to treat it as a mere presumption and allow it to be rebutted by ordinary proof as in other cases. And we are not without the warrant of high authority for this view of the subject. In the case of Page vs. Patten, et al., above cited, at page 314, Justice McLean, in delivering the opinion of the court, remarks as follows: "the law presumes his own debt to be satisfied, when assets come to his hands to the amount of it, there being no debts of higher degree. But may not this presumption be rebutted by an application of the money in the payment of other debts." Again at page 315, he says: "the right of an administrator to retain the money in his hands for the discharge of his own

debt, is as unquestionable as if it had been paid to him on execution. It is his own, and he may retain it as such.—This is is the case put by some of the Judges in illustration of the principles, *but it is nowhere said that a waiver* of this right is an abandonment of it." Again at page 316, he says: "if such a right did not exist, the executor or administrator, would be in many cases without remedy. The principle was intended for his benefit and not to *mislead or entrap him.*"

But notwithstanding these liberal and enlarged views, this distinguished jurist felt himself, as did the majority of the court, constrained to adopt the English view of the subject. And with such precedent before us, we are admonished to beware of rashly trenching upon a well established canon of the common law, as announced by its early sages. It may be proper to remark, however, that the case last referred to, involved a contest between the respective beneficiaries of the legal and equitable assets of the estate. How the question might have been decided, had it been presented as it is by the pleadings in this cause it is useless to conjecture.

But it was contended by the counsel for the appellant, that by virtue of our legislation on the subject, the common law doctrine of retainer has been wholly superceded and we were referred to Thompson's Dig., 196, § 6.—The Section referred to is in these words: "If a creditor be appointed the executor or executrix, the administrator or the administratrix of an estate, and the said estate be insolvent, he or she shall not thereby be entitled to prefer his or her debts to the exclusion of other demands against said estate, but shall be bound to make a *pro rata settle-*

ment of all demands which may be rendered in, according to law."

It is an admitted canon, applicable to the construction of statutes, that where a statute contravenes or alters a principle of the common law it must always be strictly construed. And without any very stringent application of the rule, it seems to us very obvious, that the provision referred to is confined exclusively to insolvent estates, and that it was not the intention of the Legislature that it should have any more extended operation. The statute on this subject in the State of Alabama is similar to ours, and the case cited by the counsel for the appellant, as an adjudication on the operations of that statute, would seem to sanction the views taken by us. (Vide Shortbridge vs. Easely, 10, Ala.; Rep. N. S., 520.)

In the State of Tennessee, a similar provision is incorporated into their statute law, and in the case of Smith vs. Watkins, 8 Humphreys Rep., 341—2, the point now under consideration, was expressly adjudicated, and the decision of the court fully sustains our views. Green, Justice, in delivering the opinion of the court, says: "We do not think this doctrine is at all affected by our legislation except in relation to insolvent estates. Our insolvent laws require a distribution *pro rata* of an insolvent estate among all the creditors; and of course in such case the right of retainer does not exist. But in relation to estates not operated upon by these laws, the common law doctrine of retainer applies in all its force. But for these laws it is admitted, the doctrine would exist here; and we are unable to perceive the force of the argument, that the change our Legislation has made in relation to the estates of insolvent persons, by consequence, works such a change in the prin-

ciple of retainer, so as to modify the doctrine from a conclusion of law, to a mere presumption of fact." Sustained as we are, by this concurrent authority, we are the more confident in the correctness of the conclusion to which we have arrived, that the provision of our statute, which was cited by the appellant's counsel, has made no such change as is contended for, nor indeed any change except in relation to the class of estates to which it applies in terms.

Now as the fact of insolvency, if it did really exist, was a matter to be *replied* by way of avoidance, it was not necessary or proper that the plea should have alleged the solvency; the legal presumption is, that the estate is solvent until the contrary is made to appear.

Not feeling that the principle involved in this case would authorize us to disregard the maxim of *Stare decisis*, we are constrained to overrule the *first* assignment of error, and to affirm the judgment of the court below which overruled the plaintiff's demurrer to the defendant's fourth plea.

The 2nd error assigned is, "that the court erred in sustaining defendant's demurrer to plaintiff's replication."

In order to determine upon the correctness of this assignment, we must revert to the pleadings as they are set forth in the record. The plea sets up as a bar to the action, that the plaintiff in his character of executor, had received of the assets of the estate an amount more than sufficient to satisfy his demand against the testator. The replication admitting the matter of inducement stated in the plea, viz: that he had assumed the execution of the will, and had received a sufficiency of assets, attempts to avoid the bar by alleging that he had been "discharged as executor from said estate, without retaining or being allowed the

same." To this replication there was a demurrer which raised the question of its sufficiency as an answer to the plea, and this is the point we are called upon to decide under this assignment as error.

The averment of the replication is in the following words, viz: "but plaintiff avers that he did not retain the whole or any part of said indebtedness out of said assets, and that he was afterwards, to-wit: on the day of discharged as executor from said estate, without retaining or being allowed the same." Now without invoking the stringency of that rule which requires, that in the interpretation of the language of any pleading, it shall be taken most strongly against the parties using it, it is very obvious that the term "discharge" as used in the replication may very well comport with the idea of a *regular discharge after full administration,* and by no means contravenes that idea. But giving to the term the interpretation contended for, viz, an involuntary or compulsory dismissal, from the office of executor, yet the other hypothesis assumed in the argument, viz: that the discharge occurred *prior* to the expiration of the two years prescribed by the statute for the settlement of estates, is wholly unsustained by any averment in the replication. The date of the alleged discharge is in blank, and even if the blanks had been filled up with the day and year, yet the averment would still have been defective for the want of an express allegation that this date was prior to the lapse of the two years; for otherwise the conclusion could have been arrived at only by a course of calculation, which would have rendered the pleading *argumentative* and therefore defective.—The replication is clearly bad for the want of *certainty,* both as regards the *date* and the character of the discharge.

It is the first essential of good pleading that it be characterized by *certainty,* and this *quality* is especially requisite in a replication. Mr. Archbold in his work on Pleading and Evidence says: "the declaration must show plainly and *certainly* all circumstances material to the maintenance of the action; for if there be two intendments, it shall be taken most strongly against the plaintiff." Arch. Plead. & Evidence, 108. Again he says: "the rules of pleading in case of declarations and pleas in bar are applicable also to replications." Ib., 242. And again: "a replication requires more certainty than a declaration." Ib., 257.

The case was further argued by the appellant's counsel upon the hypothesis of the *insolvency* of the estate; but here again the position assumed was equally unfortunate, for there is no allegation in the record to support it. If it was true that the fact of insolvency really existed, then, in order to bring the case within the operation of the provision of the statute, it was essentially requisite that the fact should have been made the subject of direct and positive averment in the replication. Upon reference, however, to the record, we can discover no intimation of the kind.

With the most anxious desire to accord to the appellant any benefit which might have accrued to him from the establishment of the position assumed in the argument on the second assignment of error, we are reluctantly forced to the conviction that neither of the hypotheses upon which the argument proceeded, find any sanction in, or support from the averments contained in the replication, and are therefore constrained to decide that the matters as therein pleaded afford no sufficient answer to, or avoidance of the defendant's fourth plea.

The ruling of the Judge below upon both points is sustained: therefore the judgment of the Circuit Court will stand as affirmed with costs.

SARAH A. LINES, APPELLANT, VS. HENRY D. DARDEN, ET AL., APPELLEES.

The court will act upon a petition for a rehearing, where it was presented in time, although two of the Judges who sat on the hearing of the cause, have since the decree was made, gone out of office.

Motion for a rehearing made in behalf of appellees.—The opinion of the court states the facts in connection with the filing of the petition.

W. G. M. Davis, for the motion.

J. T. Archer, contra.

DOUGLAS, J., delivered the opinion of the Court.

This case comes before us upon a petition for a rehearing of a case, decided by this court at its January term in the year 1853, at Tallahassee. After the decision was made, and before this petition was presented, one of the Judges who sat at the hearing of the cause, had left, and gone to East Florida. The other two Judges disagreed upon the question whether they in the absence of the other Judge could act upon the petition in any way, and the consequence was that the petition lay over without any

formal continuance until the last January term. In the meantime two of the Judges who sat on the hearing of the cause had gone out of office, and there were not Judges in attendance competent to hear it, and it again lay over to the present term and is now brought before the court, only one of the Judges of which sat at the hearing of the case. The decree of the court below was reversed and the bill was ordered to be dismissed, and the appellees seek by the petition to open the case for rehearing. Under these peculiar circumstances it is objected by the appellant that the court as now constituted, cannot with propriety hear the petition; that a rehearing can only be granted by the same Judges who pronounced the decree, and there is certainly much force in this objection, yet as the parties, had we declined to entertain the petition, would have been deprived of the benefit of a legal right without any fault on their part, we have deemed it proper to act in this matter, and in order that the Judges who did not hear the argument of the cause in this court might be able to do so understandingly we have gone beyond the rule which provides that "the court will consider the petition (for a rehearing) without argument," and received the printed brief of the solicitor for the petitioners, which, as well as the petition and the decree sought to be opened, have been read with great care and attention, and many of the authorities cited in the brief have been carefully examined, while we have not looked into the brief on the other side, although it is printed in the report of the case, and after the most mature consideration we are constrained to say that the decree appears to us to be correct, and that the prayer of the petition should be denied. But while we feel ourselves compelled to adopt this course, we may be

permitted to indulge the hope, that the appellant will not withhold from the appellees the loan of the property which she offered to make them before the institution of this suit, and which they then, we think, mistakingly refused to receive, and indeed, that she will extend them further aid, if their circumstances may require it. Her duty as a *mother* we have no hesitation in saying, does, under the peculiar state of the matter require this at her hands.

Let the petition be dismissed.

JACOB L. GRONER, APPELLANT, VS. THE STATE OF FLORIDA, APPELLEE.

1. In an indictment for gaming, it is unnecessary to state the name of the game played or bet upon.
2. An allegation that it was at "a certain game of cards" is sufficient.
3. The name of the person with whom the bet was made must be stated, or it must be alleged that such person was to the jurors unknown.
4. The common law declares that an indictment for an offence against the statute, must with certainty and precision charge the defendant to have committed or omitted, the acts under the circumstances, and with the intent mentioned in the statute.
5. The place was sufficiently stated, by saying (after stating the venue) in the County of Leon, and at a certain game of cards.

The appellant was indicted and convicted for playing at a certain game at cards. The indictment alleged that Ja-

cob L. Groner unlawfully, &c., "did play and bet at a certain gaming table, then and there being, at a certain game at cards for the purpose of winning or losing money, against the form of the statute," &c.

A motion was made in arrest of judgment on the ground that the first count in the indictment on which alone the defendant was convicted, does not state the place, the name of the game, the name of the person with or against whom the defendant played, or give any excuse for not giving such name. The motion was overruled and defendant appealed.

J. T. Archer & A. L. Woodward for Appellant.

M. D. Papy, Attorney-General, for the State.

DOUGLAS, J., delivered the opinion of the court.

The appellant was indicted and convicted for playing at a certain gaming table at a certain game of cards. A motion was made in arrest of judgment on the following grounds, to wit

Because, the first count in the indictment on which alone he was convicted, does not state the place, the name of the game, the name of the person with, or against whom the defendant played, or gave any excuse for not giving such name. This motion was overruled and a judgment entered, from which defendant appealed to this court. The case was argued mainly upon the *last* ground taken in arrest of judgment, and rightly so, for the *first* and second were untenable. The place being we think sufficiently stated, viz: "in the County of Leon, at a certain gaming table." The name of the game it was unnecessary to state; it is alleged to have been "a certain game of cards." This we deem sufficient. In the State vs. Bougher, 3 Blackf., 307, and the State vs. Maxwell, 5 Blackf., 230, which were in-

dictments for gaming, it was so held. It was also objected to the indictment in the latter case that the name of the person with whom the bet was made is not given. This objection the court held was not tenable, because there are cases in which the name of the third person cannot be ascertained, and in any case it is (says that court,) sufficient to state that such person was to the jurors unknown; and see Chitty's Criminal Law, 213—(*and authorities there cited.*)

In the case of the State vs. Stackey, 2 Blackf., 289, and the State vs. Jackson, 4 Blackf., 49, which were for retailing spirituous liquors without a license, the court held that the indictment must state the name of the person *to whom the sale was made,* or state his name to be unknown.

In the case of Butler vs. the State, 5 Blackf., 280, it was held that "an indictment for gaming must state the name of the person *with whom the defendant played,* or allege the names to be unknown. In this case, the court cited that of Halstead vs. the Commonwealth, 5 Leigh's Virg., Reps., 724, which was for selling spirituous liquors, in which it was decided that the name of a purchaser in such a case need not be alleged, and remark that the reason given by the court for that opinion is, that the purchaser is not injured by the offence. We conceive, however, (says the Supreme Court of Indiana,) that the third person's name is required in such cases, not because he is injured, but because his designation is a material part of the description of the offence; and that court might with propriety have added, that even if the reason given by the Virginia court was a sound one as to the purchaser of ardent spirits, it does not apply in a case of gaming, for there the injury to the person betting was the very evil against which

the statute was intended to provide. In the case of Davies vs. the State, 7 Ham. Ohio Reps., 204, it was held that "an indictment against a person for permitting gambling in his house should give the names of the offenders or state their names to be unknown, and this case is fully sustained by that of Buck vs. the State of Ohio, 1 McCook's Reps., 61, which was also an indictment for gaming. In the case of Butler vs. the State before cited, the court says, "we think it important in such cases, that the indictment should if possible, allege the name of the third person, in order that the accused may be better apprised of the charge against him. If the name be not known, that circumstance should be stated in the indictment as an excuse for omitting the name." This seems to us a reasonable rule, and we believe it generally prevails, although it has been relaxed by statute in some of the States, and especially in Alabama, as appears by the cases of Holland, et al. vs. the State 3 Porter, 295, and Coggins vs. the State, 7 Porter, 264, cited by the Attorney-General.

In the first the court says: "*before the statute* it was necessary to state in the indictment the particiular game which the accused was charged with playing; and if the evidence did not show that the particular game had been played, there would be no conviction,"—a greater degree of strictness than we require.

In the last case, Collier, C. J., said, "the first question raised was brought directly to the view of the court in the case of the State vs. Holland, et al., 3 Porter, 292. There the indictment charged the defendant with playing *at cards* and the court determined that it was in conformity *with the statutes which prescribes the requisites.*" Our statute prescribes *no such requisites,* but leaves the indictment as at

common law, which declares that it must, for an offence against the statute, with certainty and precision charge the defendant to have committed or omitted the acts under the circumstances, and with the intent mentioned in the statute, and if any of these ingredients of the offence be omitted, the defendant may demur, move in arrest of judgment, or bring a writ of error, and the defect will not be aided by verdict. 2 East 333; Arch'd. cr. Law, 1 Ed., page 23.

The indictment must be certain as to the person against whom the offence was committed. Ibid, Ed., 1840, page 27. Also as the facts and circumstances, and intent constituting the offence. Ibid., 38. The circumstances must be stated with such certainty and precision that the defendant may be enabled to judge whether they constitute an indictment offence or not in order that he may demur or plead to the indictment accordingly. Ibid., 39, and that there may be no doubt as to the judgment which should be given if the defendant should be convicted. Ibid, and Rex vs. Horne, Cowper, 675; and that he may be enabled to plead a conviction or acquittal upon this indictment in bar of another prosecution for the same offence. The King vs. Mason, 2 Term Reps., 581. The King vs. Manoz, 2 Strange, 1127.

The statute of 18 Geo., 2, chap. 34, sec. 8, enacts that, "if any person shall win or lose at play or by betting at any one time the sum or value of ten pounds, or within the space of twenty-four hours the sum or value of twenty pounds, such person shall be liable to be indicted," &c.

The form of the indictment under the latter cause of that statute as given by Archbald, after the usual commencement and stating the time and place &c., runs thus:

"by playing at and with cards, to wit: at a certain game of cards called *rouge et noir,* with one J. N., unlawfully did win of the said J. N. at one time and sitting, above the sum and value of ten pounds, that is to say," &c. And the learned author says, "all that the prosecutor has to prove is, that J. S. won of J. N., at one sitting, a sum exceeding ten pounds, at the game specified in the indictment." Here again it will be observed that the prosecutor is held to greater strictness than we deem necessary; that is, to prove the name of the game played. It is true that there is a class of cases where less precision is required, even in England, such as Barratry, Nuisance, Keeping a House of Ill Fame, Common Scold, &c., but these are exceptions to the general rule. Two cases somewhat akin in principle to these, were also cited on behalf of appellee, viz: the State vs. McCormack 2 Carter's Ind. Reps. 305, and Dormer vs. the State, Ibid, 308. The first was an indictment for keeping a gaming house. In these cases the salutary rule, that where a subject comprehends multiplicity of matter, and a great variety of facts, there, in order to avoid prolixity, the law allows general pleading, was applied; but in the case of the State vs. Irwin, 5 Blackf., 343, it was held, that an indictment for unlawfully winning of several persons (naming them,) and *others,* a certain quantity of beef, &c., was bad for not naming *all* the persons with whom the bet was made, or stating that the names not given were unknown; and the case of Ball vs. the State, 7 Blackf., 242, which was an indictment for gaming, is to the same effect. It seems, therefore, to be a well settled rule, sustained both by decided cases and elementary principles, that in such cases as the one before us, the name of the person with or against whom the defendant played or bet, should be stated or alleged to be unknown, unless indeed,

the rule has been relaxed by statute, which is not the case in this State. It may not be improper for us to add, that we have looked into the statutes of Indiana and Ohio, on the subject of gaming (the statutes on which most of the cases cited are based) and find them substantially the same as those of our State on the same subject. Let the judgment be reversed and the cause be remanded to the court below for further proceedings not inconsistent with this opinion. *Per Totiam Curiam.*

WILLIAM E. KILCREASE, APPELLANT, VS. PLEASANT W. WHITE, APPELLEE.

1. The endorsee of an *over-due* promissory note takes it as against the maker, with all the equities arising out of the note transaction itself, but not subject to set off in respect to a debt due from the endorser to the maker of the note, arising out of the collateral matters.

2. This doctrine rests upon the law merchant which forms a part of the common law. The statute of set offs does not apply to it.

Appeal from a judgment in the Circuit Court, for Gadsden county.

John Erskine, for Appellant.

P. W. White, for Appellee.

DOUGLAS, J., delivered the opinion of the court.

The appellee in this case sued the appellant in the Gads-

den Circuit Court in an action of assumpsit on several promissory notes. The *third* count in his declaration (upon which the question presented for our consideration arises,) is as follows, viz: "and whereas also, the defendant heretofore on the fifth day of November, A. D. 1853, made his certain promissory note in writing, and thereby promised to pay to the said Mary C. Rogers or bearer the sum of five hundred and sixty eight dollars and sixty-five cents, one day from the date thereof, (which period had elapsed before the commencement of this suit,) with eight per cent. interest thereon until paid for value received, and the said Mary C. Rogers then tranferred, assigned and delivered the same to the plaintiff; whereof the defendant then had notice, and then in consideration of the premises, promised to pay the amount of said note to the plaintiff according to the tenor and effect thereof." To which count the defendant put in a plea of set off in the usual form, of certain goods and chattels, &c., &c., alleged to have been sold and delivered by the said defendant to the said Mary C. Rogers after the making of the said promissory note, and before the commencement of this suit, and averring that the said promissory note was transferred, assigned and delivered to the plaintiff after it had become due and payable. To this plea the plaintiff demurred. 1st, Because the matters therein pleaded as matters of set off are not shown by said plea to be debts or demands against the plaintiff, but against a third party not a party to the suit. 2nd, Because the said plea does not show that the matters therein pleaded were a part of, or arose out of the transaction for which the said note was given, but that they were shown to be collateral transactions with the payee of said note; and the said plea is in other respects insuf-

ficient in law. Wherefore, he prays judgment, &c. The defendant joined in demurrer; the demurrer was sustained, the plea held bad, and a judgment was entered for the plaintiff from which the defendant appealed to this court, and we are now called upon to say whether that judgment is right or not. We promise in the out-set, that the question thus presented does not rest upon our statute of set off, (which is in substance the same as that of the English statute, so far as regards the set offs of mutual debts) but upon the principles of the law merchant; the statute does not apply to it. The plea, it will be observed, alleges that the note was transferred, &c., after it became due and payable; the demurrer admits that fact.

For the appellant, it is insisted that "the authorities are abundant and uniform that where a note is negotiated after it is due, its non-payment is a suspicious circumstance," that it comes to the assignnee discredited and dishonored, and that the law is he takes it wholly on the credit of his assignor, and subject to all demands that existed against him at the time of the transfer, and the following authorities are cited in support of this position. 3 T. R., 81; 13 East, 497; 1 Campbell, 383; 5 John., 118; 19 Ibid, 342; 13 Peters, 66; 14 Ibid, 318—321; 1 Dennis, 583; 6 Hill, N. Y., 327; 5 Pick., 312; 1 Hill, S. C., 9, 15; 4 Mass., 370—most of which we have examined, some of them have but a remote bearing upon the question, a few of them sustain the position assumed; most of them, however, which treat directly upon the matter of set off, say merely that the assignee of a note transferred after it has become due, takes it subject to all the equities that existed between the original parties to it, without entering into any explanation as to what those equities are. This loose manner of

stating the doctrine respecting the rights of an assignee of an overdue note or bill, has doubtless led to much of the misapprehension which seems to have prevailed on the subject.

On a review of the authorities, we think the learned counsel for the appellant has laid down the doctrine too broadly, that he is mistaken when he says the authorities are uniform in support of his position, and that the rule is more correctly stated (according to numerous late authorities at least,) by the appellee, viz: that the assignee of an overdue promissory note takes it subject to those equities, and those only which affect the note itself, but not subject to a set off in respect to a debt due from the payee to the maker of the note, arising out of collateral matters. Judge Story in his work on promissory notes, sec. 190, page 200, says: "if the transfer is after the maturity of the note, the holder takes it as a dishonored note, and is affected by all the equities between the original parties, whether he has any notice thereof or not. But when we speak (he says) of equities between the parties, it is not to be understood by this expression that all sorts of equities existing between the parties from other independent transactions between them are intended, but only such equities as attach to the particular note and as between those parties, would be available to control, qualify or extinguish any rights arising thereon, citing Bailey on Bills, chap. 5, sec. 3, page 161—162, 5 Ed., 1830, (and see Ed., 1836, page 133,) Burroughs vs. Moss, 10 Barn. and Cresw., 563; Story on Bills, sec. 87, n. 3, and Whitehead vs. Walker, 10 Mees. and Welsh., 696; 10 Barn. and Cresw., we have not been able to obtain, but the other authorities cited are fully in point. In 10 Meeson and Welsby the court say: "the

case of Burroughs and Moss is good law. That case decides that the endorsee of an over due promissory note takes it as against the maker, with all the equities arising out of the note transaction itself, but not subject to a set-off in respect of a debt due from the endorser to the maker of the note arising out of collateral matters." In Georgia the same doctrine prevails, see Tinsley vs. Beall, 2 Kelly 136. The same doctrine is also held in the case of Chandler vs. Drew, 6 New Hamp. Reps., 469. In this case the court say: "It is true that there may be cases of hardship upon the defendant without a set-off, but that happens under all general rules. They occur as rarely under the rule which excludes this set-off as under any other rule; page 475. If the maker of a note perform services for, or deliver goods to the payee, he has only to see that they are applied to the payment of the note, and he can never suffer; if he suffer by having his own set-off rejected, it is through his own neglect. In Hughes vs. Large, 2 Barr Penn. R., 103, it was held that the endorsee of an over due note takes it subject to the equities arising out of the note itself and not to set-off generally, and the court, page 104, say, as the law merchant is a part of the *jus gentium* we receive foreign precedents as controlling authorities when they would not overturn our own decisions; and it was distinctly ruled in Burroughs vs. Moss., 10 B. & C., 558, and Whitehead vs. Walker, 10 Mees. and Welsb., 696, that the endorsee of an over due note takes it liable to equities arising out of the transaction itself, but not to set-off. "It is somewhat remarkable (say that court,) that this distinction between equities and cross demands did not occur in England before 1830, though it had been taken three years before in Massachusetts and New York. It has been rec-

ognized by Mr. Justice Story, Law Prom. Notes, sec, 178; "it is a settled principle of commercial law; and though I (Chief Justice Gibbons,) would have decided the point at nisi prius, as it was decided in the court below, I concur with my brother that it is proper we conform to what is to be the universal rule." Page 105.

In the case of the endorsement of a note under circumstances to leave the endorsee in privity with the endorser, it is now settled in England (says the annotator to 1 Hare's and Wallace's Leading cases, page 194,) and in most cases in this country, that the endorsee is affected only by those defences, that are connected with the note itself, and not by antagonist claims, or sets-off that are wholly independent of the note, citing Burroughs vs. Moss, 10 Barn. and Cresw., 558; Whitehead vs. Walker, 10 Mees. and Welsb., 696; Hughs vs. Large, 2 Barr., 103; Cumberland Bank vs. Haun., 3 Harrison, 223; Chandler vs. Drew, 6 New Hampshire, 469; Robertson vs. Breedlone, 7 Porter, 541; Tuscumbia, &c., R. R. Co., et al. vs. Rhodes, 8 Alabama, 206—224; Robinson vs. Lymon, 10 Connecticut, 31; Steadman vs. Jilson, Ibid, 56; and Britton vs. Bishop, et al., Vermont, 70, which fully sustain the position they are adduced to support; to which may be added the following cases which are also in point; Hudson vs. Kline, 9 Gratten, 380; Schemerhorn vs. Anderson, 2 Barbour's S. C. A., 584; Green vs. Darling, 5 Mason, 201; and Hunkins vs. Sloup, 2 Carter, 343; this last case was decided upon the authority of Burroughs vs. Moss, which appears to be a leading one.

"The rule (says Chitty in his late work on Bills of Exchange, Amer. Ed., 1839, page 245, vide 246. Ed., 1849, page 220,) that a party taking an overdue bill, takes it

subject to the equities to which the party delivering the bill to him was subject, *is qualified* and restrained to all equities arising out of the note *or bill transaction itself,* and is not subject to a set-off of a debt due from the endorsee to the maker of the note arising out of collateral matters."

And at note A, on the same page, Burroughs vs. Moss, is cited thus, viz "the judgment of the court was delivered by Bailey, J., as follows, viz:" "This was an action on a promissory note made by defendant, payable to one Fearn and by him endorsed to the plaintiff after it became due.—For the defendant, it was insisted that he had a right to set-off against the plaintiff's claim or debt due to him from Fearn, who held the note at the time when it became due; on the other hand, it was contended that this right of set-off which rested on the statute of set-off, did not apply.—The impression of my mind was, that the defendant was entitled to the set-off, but on discussion of the matter with my Lord Tenterden and my learned brothers, I agree with them in thinking that the endorsee of an over due bill or note, is liable to such equities only as attach on the bill or note *itself,* and not to claims arising out of *collateral* matters; the consequence is that the rule for reducing the damages must be discharged. Burroughs vs. Moss, S. C., 8, Law, J., 287."

Now although we are ready to admit that there are some cases the other way, that in a few of the statutes of the Union the courts may yet adhere to the doctrine which is so generally exploded that in one of them the statute obliges them to do so, yet the weight of the authorities we have cited to sustain our position seems to us irresistible, and leaves to us no alternative but to apply to the question

the doctrine of *stare decisis,* and consequently to sustain the judgment of the court below.

The view that we have taken of the second question presented for our consideration, renders it unnecessary to say anything in regard to the first.

The judgment of the Circuit Court will be affirmed with costs.

Per totiam curiam.

WILLIAM W. CROOM, APPELLANT, VS. JOHN NOLL AND WIFE, APPELLEES.

1. An agent is a competent witness to prove his own authority if it be by parol
2. He stands in the character of a disinterested and indifferent witness between the parties in all ordinary cases.
3. If the plaintiff recovers on his agency when in fact he was not agent, but had assumed an agency which could only be established by his own evidence, he would be answerable to the defendant; and if he assumed the character of agent without being authorized, and in such character imposed on the plaintiff he would be responsible to him.
4. Agents are witnesses, and in many cases they are so *ex necessitate,* even where they may be *interested.*
5. The exception being founded upon consideration of public necessity and convenience, it cannot be extended to cases where the witness is called to testify, to matters out of the usual and ordinary course of business.
6. Where the agent has direct interest in the event of a suit relating to a con-

tract made by him independently of his acts as agent, he is not a competent witness for his principal in regard to such contract.

7. Notwithstanding prima facie appearance of an interest on the part of the witness on the face of the record, yet his evidence ought not to be rejected without examining him on his *voir dire* as to his *situation*, or adducing other proof to show that fact.

8. As a general rule the vendor of goods having possession and selling them as his own, is held bound in law to warrant the title, and therefore, he is generally not a competent witness for the vendee in support of the title.

9. But it does not follow that the vendor of goods is necessarily interested or bound to warrant the title. He may not have been in the possession of the goods when he sold them, or he may have sold them *without recourse;* or he may have a *release* from the purchaser.

10. The disqualifying interest must be some certain, legal and immediate interest however minute, either in the event of the suit or in the record, as an instrument of evidence, in support of his own claims in a subsequent action.

11. The mode of *proving the interest of a witness*, is either by his own examination or by evidence *aliunde*.

12. When the objection to the competency of the witness arises from his *own examination*, he may be further interrogated to facts tending to remove the objection, though the testimony might on other grounds be inadmissible.

Appeal from a judgment of the Circuit Court for Gadsden county.

For a full statement of the facts presented by the record, reference is made to the opinion of the court.

P. W. White, for Appellant.

Bolling Baker, for Appellees.

DOUGLAS, J., delivered the opinion of the court.

The appellant instituted an action of assumpsit in Gadsden Circuit Court against the appellees, on a promissory note. There is but one count in his declaration, which is as follows, to wit: William W. Croom complains of John Noll and his wife, Elizabeth Noll, who were summoned to

answer him by a plea of trespass on the case upon promises.

For that whereas the said Elizabeth Noll, while she was sole and unmarried, to wit: on the fifteenth day of December, in the year of our Lord, one thousand eight hundred and forty-eight, at Tallahassee, to wit: in the county of Gadsden aforesaid, made her certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit: the day and year aforesaid, and thereby, then and there promised one day after the date thereof, to pay Coe, Anderson & Co., or order, the sum of one hundred and eleven dollars and seventy cents, for value received, and then and there, delivered the said promissory note to the said Coe, Anderson & Co., who by the endorsement thereof transferred the same to the said plaintiff, by means whereof the said Elizabeth Noll, while she was sole and unmarried, then and there became liable to pay to the said plaintiff the said sum of money, in the said promissory note specified according to the tenor and effect of the same, and being so liable, &c., going on and concluding in the usual form.

To this declaration the defendants put in three pleas.—First, The general issue. Second, That the said Elizabeth did not sign or execute, make or deliver any such note as that described in plaintiff's declaration. Third, That no consideration was ever given for the said note. The last two pleas concluded with a verification and were put in under oath, which under the provisions of our statute cast the burthen of proof upon the plaintiff; a jury was empanelled and sworn, whereupon the plaintiff offered the above described note in evidence and to prove the execution consideration and assignment of the said note;" also

offered in evidence the deposition of the said Albert Bestwick, who testified,—*First,* That he did not know John Noll, but did know Elizabeth Batringriter in 1848. *Second,* That the said note was made by Elizabeth Batringriter in his presence, on the day of its date. She made her mark to it in his presence; that it was delivered to him as agent for Messrs. Coe, Anderson & Co.; that the consideration of this note was goods, wares and merchandise, sold by him to her. The account for said goods was assigned by him to said Coe, Anderson & Co., with other accounts and notes in payment of debts due to them by him; that he was acting as their agent for certain purposes; the account of Elizabeth Batringriter and other accounts and notes which he had assigned, as above stated, to Coe, Anderson & Co., were left by them in his hands for collection and settlement, and that he did go on to collect and settle them as their agent, and as such agent he took the note above referred to, to close the open account that as agent for said Coe, Anderson & Co., he sold that note to A. K. Allison on the 27th March, 1849, and delivered it to him.

The defendants objecting to the testimony of Albert Bestwick as a witness in this case on the ground of interest in the cause of action, and ultimate liability to the holders, and for incompetency generally to testify in the case, filed sundry cross interrogatories, and the said witness upon his cross examination testified that Elizabeth Batingriter for several years prior to the date of said note, had an open account at his store in Tallahassee; it varied in amounts at different times, sometimes she owed him two or three hundred dollars. The amount she owed him when the note was given, was the amount specified in the note; that he had previously transferred the accounts

to Coe, Anderson & Co., so that she owed them and not him, and was indebted to them for that amount and upon that consideration; that he was indebted to Coe, Anderson & Co., at that time and previously, and did transfer to said firm, notes and accounts due to him; that he never had any written authority or power to act for Coe, Anderson & Co.; *that his authority was verbal only,* and received from John Geo. Anderson of that firm. To which deposition the defendants' counsel objected, *because* of the incompetency of the witness on account of his interest as disclosed by the deposition and by his endorsement of the note, which objection was sustained by the court. The plaintiff then offered to examine A. K. Allison as a witness, to which the defendants objected because of his interest as guarantor, which objection was also sustained by the court, and the witness was not examined.

The defendant moved to exclude the evidence of Bestwick unless the plaintiff should first prove by evidence *aliunde* the deposition of Bestwick, that Bestwick was the agent of Coe, Anderson & Co., the payees of the note.—The court overruled the defendant's motion and ruled that the witness was competent to prove his own agency, unless it was shown that witness was interested in establishing the fact of agency; to all which rulings of the court the defendant excepted, and prayed the court to sign his bill of exceptions, which was accordingly done.

The jury returned a verdict for the defendants, wherefore judgment was rendered, and whereupon the plaintiff appealed to this court, and the question now presented for our consideration is, whether these several rulings were correct or not.

The first question presented is, whether Bestwick is a

competent witness to prove his own authority. It will be observed by reference to his deposition that he says, that he never had any written power of attorney to act for Coe, Anderson & Co., *that his authority was verbal only;* and Professor Greenleaf in his able treatise on the Law of Evidence, vol. 1, page 564, 3 Ed., 1846, lays down the rule expressly, that "an agent is a competent witness to prove his own authority if it be by parole." In Rice vs. Gore 22 Pickering, 160, Dewey, J., delivering the opinion of the court, said, "the general principle that the testimony of agents and servants may be given without a release, is a familiar one, and is not controverted by the counsel for the defendant; but he denies the competency of one professing to have acted as agent, to establish the fact of his authority by his own testimony. "The principle (he says,) as found in the elementary books, as well as in the reported cases, seems to be broad enough to support the position that in an action against the principal, the authority of the agent to act may be proved by the agent himself, citing Paley on Agency, 212, and 1 Philips on Evidence, 79. In this case suit had been brought on a promissory note which was as follows, viz:

BOSTON, October 20, 1836.

"For value received we *jointly* and *severally* promise to pay Samuel Rice, him or his order, the sum of one hundred dollars, borrowed money, on demand with interest.—Patten and Johnson for Ira Gore." The defendant denied the authority of Patten and Johnson to borrow money or execute notes as his agent. The plaintiff offered in evidence the deposition of Patten, for the purpose of proving that he was authorized to act for the defendant. The defendant objected to the admission of the deposition on the

ground that the deponent was interested, but the objection was overruled and the question reserved for the consideration of the court. The jury found a verdict for the plaintiff . If the deposition was admissible, the verdict was to be set aside, and a new trial granted, otherwise judgment was to be entered on the verdict, and after a full argument before the Supreme Judicial Court, *judgment was entered on the verdict.* We have cited this the more at length because it was decided by a very able court, and seems to be much in point. Paley and Philips also lay down the rule as it is stated by Greenleaf. Kirkpatrick vs. Cisna, 3 Bibb, 244, is also in point. This was an action of detinue for the recovery of a negro. The plaintiff derived his right under the sale of a supposed agent of an administratrix. To prove the agency he introduced the agent himself who deposed to his authority to sell, by a letter from the administratrix, which had been accidentally lost or mislaid, and that he sold to the plaintiff, then in possession of said negro, for the purpose of paying a debt against the estate of the intestate. This evidence was on motion of the defendant excluded from the jury as incompetent. The case was taken up to the Court of Appeals, and for this cause the judgment was reversed with costs, and the cause remanded for a new trial. The court said, "the principle that an agent is a competent witness is incontestably settled. He stands in the character of a disinterested and indifferent witness between the parties. The verdict either in favor of one or against the other, leaves him in the same situation, as responsible to the other. If the plaintiff recovers on his agency when in fact he was not agent, but had assumed an agency which could only be established by his own evidence, he would

be answerable to the defendant; and if he assumed the character of agent without being authorized and in such character imposed on the plaintiff, he would be responsible to him, so that as between the parties he is indifferent, and is therefore competent." See Peake's Evidence, 178. Here then we have the general rule upon which the competency of the agent to prove his own authority as agent is placed, and it seems to be in accordance with general principles.

"As a general rule, (say the Supreme Court of Indiana, 8 Blackf., 49,) agents are witnesses, and in many cases they are so '*ex necessitate,*' even when they may be interested." In Fisher vs. Willard, 13 Mass. R., 380, Lincoln for defendant argued that "Richards was an incompetent witness—that he was in fact the party in interest." The court remark upon this, that "no rule of evidence is better established than the sufficiency of the objection of interest to the competency of a witness; but the exception from the rule, that agents and factors are admitted from the necessity of the thing, is as well known as the rule itself."—And see also, Phillips and others vs. Bridge, 11 Mass. R., 246; and Stringfellow vs. Hobson and Marriat, 1 Ala. R., N. Series, 573 to 575.

"The exception being thus founded upon considerations of public necessity and convenience for the sake of trade, and the common usage of business, it is manifest that it *cannot be extended* to cases where the witness is called to testify to *matters out of the usual and ordinary* course of business." 1 Greenleaf Evidence, sec. 417, page 564.

So "where the agent has a direct interest in the event of a suit relating to a contract made by him independently of his acts as agent, he is not a competent witness for his

principal in regard to such contract." Steam Navigation Co. vs. Dandridge, 8 Gill. and John., 248.

But even if it appears *prima facia* that Bestwick was interested, (and certainly nothing more appears here,) his testimony should not have been rejected, for it has been holden that notwithstanding the prima facie appearance of an interest on the part of the witness on the face of the record, yet his evidence ought not to be rejected without examining him on his *voir dire* as to his situation. Bunter vs. Warre, 1 Barn. & Cresw., 689. Wandless, assignee, &c. vs. Cawthorne, 1 Mood & Malkin, 320.

As a general rule the vendor of goods having possession and selling them as his own, is held bound in law to warrant the title, and therefore he is generally not competent as a witness, for the vendee, in support of the title; 1 Greenleaf Ev., page 546, sec. 398, Ed. 1846, and authorities there cited. 2 Kent Com., page 498, and authorities there referred to.

The case of Bunter vs. Warre, (B. & C., 689, above cited,) was an action of replevin; avowry alleging a joint holding by the plaintiff and T. B., who was no party to the record; the testimony of T. B., having been rejected without an examination of the *voir dire* to enable him to explain his situation, a new trial was granted. In Wandless vs. Cawthorne, 1 M. & M., 321, also above cited, it was held that in an action by the assignee of a Bankrupt, the competency of the Bankrupt could be restored by the examination of the Bankrupt on the *voir dire without producing the release and certificate.*

But it does not follow that the vendor of goods is necessarily interested, or bound to warrant the title; he may *not* have been in possession of the goods when he sold

them, or the purchaser may have run the hazard, if he was, by buying them *without recourse.* In either of these cases he would not be bound to warrant the title or have any interest on account of the sale. Again, Bestwick may have a *release* from Coe, Anderson & Co., from all liability in regard to the matter.

The interest to disqualify must be some legal, certain and immediate interest, however minute, either in the event of the cause itself, or in the record as an instrument of evidence, in support of his own claims, in a subsequent action. 1 Greenleaf's Ev., page 533, sec. 386, Ed. 1846, and authorities there cited.

The mode of *proving the interest* of a witness is either by his own examination, or by evidence *aliunde.* Ibid., page 513, sec. 423.

When the objection to the competency of the witness arises from *his own examination,* he may be further interrogated to facts tending to remove the objection, though the testimony might on other grounds be inadmissible. Ibid, page 572, sec. 422.

Bestwick, the witness in this case, was not examined to enable him to explain his situation touching his alleged interest in regard to the account of Elizabeth Batingriter, (now Elizabeth Noll,) assigned by him (Bestwick) to Coe, Anderson & Co., which was the consideration of the note on which this suit is founded, nor was any other testimony taken, to show whether he had a *legal, certain and immediate interest* respecting the said account or not, and as by the record such an interest does not appear, but at most only a *prima facie* interest, therefore the judgment of the court below must be reversed and the cause remanded to that court for a new trial, that an opportunity may be af-

forded for such examination or for the reception of other proof as to his situation in regard to said account, for if he is not interested in sustaining that account, he is, for aught that appears, a competent witness in regard to the whole matter.

Some other questions are presented by the record, but not in such a shape that we can with propriety consider them; but if we could, we doubt if they would change the result.

Let the judgment be reversed and the cause remanded to the court from whence it came, for further proceedings in accordance with this opinion.

[NOTE.—In this case DuPont, J., who was of counsel for plaintiff in the court below, did not sit at the hearing in this court. Hon. Wm. A. Forward, Judge of the Eastern Circuit, took his place on the Bench.]

EDWARD C. BELLAMY, APPELLANT, *vs.* THE SHERIFF OF JACKSON COUNTY, EX OFFICIO ADMINISTRATOR OF SAMUEL C. BELLAMY, DECEASED, APPELLEE.

1. A debtor in insolvent circumstance may, before lien attaches, lawfully prefer one creditor, or set of creditors to another.
2. A sale, assignment or other conveyance, is not necessarily fraudulent because it may operate to the prejudice of a particular creditor.

Edward C. Bellamy vs. Samuel C. Bellamy's Adm'r.—Statement of Case.

3. A deed made with the purpose or intent to hinder, delay or defraud creditors, is binding as between the parties; but as to creditors it is deemed to have no lawful existence.

4. In equity, the general maxim of *pari delicto*, &c., does not always prevail; circumstances of the particular case, often form conceptions, and where it is necessary, relief will be granted.

5. In assignment to a trustee who accepts the trust, and enters upon the duties thereof for the use of certain creditors, the legal estate passes and vests in the trustee, and chancery will compel the execution of the trust for the benefit of the said creditors, though they be not at the time assenting, and parties to the conveyance.

6. In a deed of trust, wherein after specifying certain slaves by name, and also enumerating other personal property, and then adding a general clause, viz: *"and all his personal effects of every name, nature and description."* &c. Held to embrace things *ejusdem generis*, with those which had been mentioned before, and to convey for the purpose of the trust, any other slaves, which then belonged to the grantor and not before specified by name and especially where the *res gestae* favors that construction, but not to pass real estate, or equity of redemption in land.

7. It is essential to the conveyance of real estate that there be some description of the land.

8. In a deed of assignment to a trustee conveying *"all the future cotton crops made on said plantation,"* an estate is conveyed commensurate with the trust; and although it does not pass the equity of redemption in said land, yet it is fiduciary license, lease or conveyance thereof, and of all that was necessary to the management of the plantation and appropriation of said crops for the objects and purposes of said trust.

9. A deed of assignment is to be construed by the *res gestae*, and thus courts are permitted to look to the circumstances and motives which led to its execution, and the objects to be accomplished.

10. In all cases where a purchase has been made by a trustee, on his own account, of the estate of his *cestui que* trust, although sold at public auction it is in the option of the *cestui que* trust to set aside the sale, whether *bona fide* made or not, and particularly where there are equitable features in the transaction.

11. A trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which have a tendency to interfere with his duty in discharging it.

tain contracts and obligations, and desirous of affording to such persons such guaranty as he may against any risk or liability which they have thus voluntarily and disinterestedly incurred; and whereas, his brother, Edward Bellamy and others hereinafter specified, and the said Samuel C. Bellamy, being anxious to assure to him just claims in advance; this indenture therefore witnesseth, that the said Samuel C. Bellamy, in consideration of the premises as well as the sum of one dollar received, hath granted, bargained, sold, aliened, conveyed and confirmed, and by these presents doth herein grant, bargain, sell, convey, assign, transfer and deliver unto the said Edward Bellamy, all the property and estate hereinafter described and specified, to wit: the following slaves, viz: Tony, Sally, Flora, Esop, and Cinda; also his stock of horses, mules, cattle and hogs, of which he is now in possession, and which cannot be more particularly described, together with his household and kitchen furniture, and all his personal effects of every name, nature and description, corn, wagons, carts, &c.; also his crop of cotton of the present year, whether now in bales, in the gin house or in the field; also all his right and interest in and to the contract for constructing the bridge across the Chipola river near Marianna. To have and to hold all and singular, the property above described, and every particle thereof, to the said Edward Bellamy, his heirs and assigns forever.

"Nevertheless, upon this especial trust and confidence herein and hereby created and declared, to wit: that the aforesaid Edward Bellamy shall have and hold the aforesaid property upon the following stated trust and for these interests, objects and purposes, hereinafter set forth, that is to say, that the said Samuel C. Bellamy shall continue and

remain in possession of all this property and effects above specified, and shall proceed with his contract in relation to the bridge, that the said Edward C. Bellamy shall receive all the rents, profits, hire and income, derived from the same to wit: the services and labor of said personal property, and the funds arising from said bridge contract, after paying necessary expenses, the said income, hire and funds to be held and applied by said Edward Bellamy for the following purposes, to wit: to reimburse, secure and indemnify the said Edward Bellamy in and upon his liabilities as endorser or security for and with said Samuel C. Bellamy, to the Life and Trust Bank of Florida, amount about twenty-seven hundred dollars; also for surety-ship of said Edward Bellamy on note to Miles Everett, of Washington county, Florida, one thousand dollars; for the indemnity of Doctor Ethelred Phillips, surety on note of about two hundred dollars; Doctor Bradford, endorser on a bill of exchange of seven hundred dollars; Mr. William Bellamy, of North Carolina, surety on a contract of seven or eight hundred dollars; Isaac Widgeon, judgment of six hundred dollars; Alexander Croom, on a draft now in suit above five hundred dollars; lastly, for the payment of all just claims not now sued, and more particular for the protection and indemnity of the sureties of said Samuel C. Bellamy on his bond for the bridge contract, and finally and especially, for the paying with all due promptness, the interest on the bank stock of said Samuel C. Bellamy, accruing to the Union Bank of Florida, and generally for the indemnity of all sureties of said Samuel C. Bellamy, who, reposing in his integrity, have loaned him their name considering them as the others, as preferred creditors, for whose security this deed is made. It is hereby provided,

that said Samuel C. Bellamy shall at any future time execute any other instrument necessary to effectuate the intents and purposes of this indenture, upon being thereto duly advised. And it is herein especially provided, that when the purposes and objects of this indenture shall have been accomplished and attained by the payment or satisfaction of the aforesaid debts, claims and liabilities, either from the income of the said property or from any other source, then and in that event, whenever it shall have been in any mode realized and consummated, the said Edward Bellamy shall upon the request of said Samuel C. Bellamy, release, reconvey and deliver all the property hereby conveyed, and all his interest and right therein, either in equity or at law, hereby vested.

"And it is herein further provided, that all the future cotton crops made on said plantation shall be appropriated by said Edward Bellamy, trustee, to the purposes and objects above set forth and declared, especially the interest on the Union Bank stock, excepting part of said cotton crops as well as corn, also hereby conveyed, as shall be requisite for necessary expenditures and subsistence.

"And it is especially in conclusion provided, that one half of the net proceeds of the bridge contract, after all necessary disbursements therein, shall be applied by said Edward Bellamy to the payment of a claim due estate of Wiliiam Sullivan, late of this county, deceased.

"And it is hereby especially provided, that a debt or claim or accommodation debt due Union Bank of Florida, and a debt due Mrs. Oveton, of Pensacola, are excluded from this trust, and the said Edward Bellamy, on his part, accepts this appointment of trustee conferred by this deed, assumes the office and covenant for himself, his heirs and assigns,

to observe the provisions of this indenture and perform the duties it creates, and preserve and maintain the confidence it reposes, according to its true meaning, interpretation, intents and designs; and said Edward Bellamy hereby acknowledges delivery of the property herein conveyed. In testimony of all and singular whereof, the parties have executed this indenture by signing, sealing and delivering the same, this nineteenth day of November, A. D., 1844, second page, eleventh line from the top, words "one thousand dollars," interlined before signing."

Signed, { S. C. Bellamy, [L. S.]. E. C. Bellamy, [L. S.]

Executed in presence of
A. L. Woodward.
Frederick R. Pittman, Clerk C. C., J. C.

He further charges that said Edward C. Bellamy, as such trustee, possessed himself of all the property mentioned and specified in the said deed of trust, and also of the crops of cotton, corn and other produce grown and raised on the said plantation in the years 1844 and 1845, and still holds the same, unaccounted for; and he also *possessed himself* of the crops of cotton and other produce grown and raised on the plantation, and with the slaves of said complainant, in the years 1846 and 1847, and was at the time of filing said bill, in possession and planting a crop for 1848, and that he had, also, on divers occasions, employed a portion of your orator's slaves in labor for himself, the said Edward Bellamy, and others, off the said plantation, of all which he had rendered no account to the said complainant.

He further charges, that notwithstanding he became so

possessed, the said Edward C. Bellamy, though by such possession having sufficient means, resources and property to have arranged with and satisfied all the creditors then having executions, and others, as their suits matured into judgment and execution, began to harrass the complainant with suggestions of apprehensions that the said deed of trust, would prove insufficient to protect and indemnify his sureties, and that it would be assailed and defeated, by reason of the preferences so given to his endorsers and sureties, on the complaint of other creditors, and therefore some other and additional indemnity should be provided for them.

He further charges, that harrassed by the ruin impending or which he in consequence of the rpresentations of said Edward C. Bellamy, supposed to be impending and near at hand, and in which he would involve his sureties, combined with the result of an unfortunate habit of indulging in the use of intoxicating liquors, by which his mind was rendered utterly incompetent to know and appreciate his real situation or to perform any of the duties incident to the ownership of property, and in fact being at times actually insane, and incapable of contracting and being contracted with, yielding himself to the direction, control and management of the aid Edward C. Bellamy, the whilst in this situation, he executed the following deed of conveyance, which is also made a part of said bill to wit:

"Whereas, Samuel C. Bellamy did heretofore, to wit, on the first day of March, 1841, execute to the Union Bank of Florida, two mortgages by which he conveyed among other things, the real estate and slaves hereinafter described, being the same slaves and their increase, except those which have died, mentioned and conveyed in and by said

mortgages. And whereas, said mortgages were made to secure to said bank the payment of three hundred and twenty-two shares of the capital stock of said bank, all of which will more fully appear by reference to said mortgages, which were duly recorded in the office of the Clerk of the County Court of Jackson county. And whereas, after the execution of said mortgages the said Samuel C. Bellamy did receive from said bank a loan of two-thirds of the amount of his said stock, being about the sum of twenty-one thousand nine hundred and thirty-one dollars, and made and delivered to said bank his note commonly called a stock note, therefor, which was renewed, and the interest paid thereon until about the day of . And whereas, there is now due to the said bank from the said Samuel C. Bellamy, besides the said stock, about the sum of five thousand and sixteen dollars, being the interest which has accrued on the said stock note since the last renewal of the same.

"Now this indenture made and entered into this 13th day of December, in the year of our Lord, 1845, between the said Samuel C. Bellamy of the one part, and Edward C. Bellamy of the other part, both of the county of Jackson and State of Florida, witnesseth, that for and in consideration of the sum of six thousand dollars to him in hand paid by the said Edward C. Bellamy, the receipt whereof is hereby acknowledged, the said Samuel C. Bellamy hath granted, bargained, sold, aliened and conveyed, and by these presents doth grant, bargain, sell, alien and convey to the said Edward C. Bellamy, his heirs and assigns, the following described real estate and negro slaves, subject, however, to the rights of the said Union Bank, in and by said mortgages, stock note, and interest due thereon as above mentioned, that is to say:

"The south-west quarter of section thirteen, township five, north, range eleven, west; the east half of the north-east quarter of section twenty-three, township five, north, range eleven, west; the east half of the south-east quarter of section fourteen, township five, north, range eleven, west; the north-east quarter of section fourteen, township five, north, range eleven, west; the west half of the north-east quarter of section fourteen, township five, north, range eleven, west; the west half of the north-west quarter of section thirteen, township five, north range eleven, west; the west half of the south-west quarter of section twelve, township five, north, range eleven, west; the south-west quarter of section eleven, township five, north, range eleven, west; the north-east quarter of section eleven, township five, north, range eleven, west; containing in all about twelve hundred acres, be the same more or less. And the following described negro slaves, to wit:

"Fife, about seventy years old; George, about thirty years old; Sam, about twenty-eight years old; Levi, about thirty years old; Jim, about sixty years old; Virgil, about forty-five years old; Amos, about fifty years old; Willie, about forty-five years old; Caesar, about sixty years old; Peter about thirty years old; Daniel, about twenty-five years old; Dick, about twenty-one years old; Isaac, about twenty-two years old; Quincy, a boy, about twenty years old; Holertie, about sixteen years old; Warrenton about eighteen years old; Jim, Jr., about fifteen years old; Marcus, about twenty years old; Silas, about fifteen years old; Sally, about forty years old; Chany, about forty-five years old; Nancy, about fifty years old; Jennet, about thirty-two years old; Laney, a woman, about thirty

years old; Haley, about thirty years old; Esther, about twenty-five years old; Hagar, about twenty-four years old; Delia, about twenty-two years old; Hannah, about twenty years old; Venus, about twenty years old; Rose, about eighteen years old; Amy, about thirteen years old; Julia, about twenty years old; Fanny, about twenty years old; Matilda, about eighteen years old; Lucy, about fourteen years old; Jane, about twelve years old; Charity, about twelve years old; Solomon, about eight years old; Daphne, a girl, about ten years old; Emily, about thirteen years old; Elias, about nine years old; Alfred, about eight years old; Sarah, about eight years old; Bill, about ten years old; Delphi, about five years old; Delilah, about three years old; Chance, a boy, about ten years old; Henry, about twelve years old; Calvin, a boy, about ten years old; Agga, about twenty-three years old; and the following named children, all under the age of five years, to wit: Tom, Marcus, Eliza, Joshua, Bob, Jefferson, John, Frank, Venus, Jr., Abby, Margaret, Rany and Teny. To have and to hold the above described real estate and negro slaves with the equity of redemption, and all the rights which the said Samuel C. Bellamy has in and to the same, to the only proper use and benefit and behoof of him, the said Edward C. Bellamy, his heirs, executors, administrators and assigns forever. And the said Samuel E. Bellamy doth covenant and agree to and with the said Edward C. Bellamy his heirs, executors and assigns in manner following, to wit: First, that there is no other lien or encumbrance on the said real estate, and slaves herein conveyed except that above mentioned. And second, that the said Samuel C. Bellamy has full power, right and authority to sell and convey the same subject only to the rights of the

said Union Bank in and by said mortgages, stock, note and interest due thereon and none other.

"In witness whereof I, the said Samuel C. Bellamy, hath set my hand and seal the day and year above written."

Signed, Samuel C. Bellamy, [L. S.]

Signed, sealed and delivered in presence of

E. Phillips,

S. W. Carmack.

Which said slaves he avers, were conveyed in and by the general terms, *"all his personal effects of every name and description"* contained in said trust deed of November 19th, 1844.

On page 13 m, of the printed record, it appears that the respondent (E. C. Bellamy,) read in evidence the following paper, to wit:

"In consideration of a deed of conveyance this day executed by Samuel C. Bellamy, conveying to me his estate, consisting of an equity of redemption in the land and negroes mentioned therein, I hereby covenant and agree to and with the said Samuel C. Bellamy to pay for the same the sum of six thousand dollars in manner following, to wit: a judgment in the name of S. C. Robbins for about twenty-seven hundred dollars beside interest, rendered against said S. C. Bellamy in the Court of Appeals, at the January term, 1845. A note due to Miles Everett for about thirteen hundred dollars including interest. A note due to the executors or administrators of H. Johnson, deceased, of North Carolina, for which William Bellamy is bound as security of said Samuel C. Bellamy, for about the sum of one thousand dollars with interest. A judgment in favor of William Baker against said Samuel C. Bellamy, for which Doctor E. Phillips is liable as his secu-

rity, for about two hundred and eighty dollars, and the balance of said six thousand dollars, if any there be after deducting the above payment, and the payment of about six hundred dollars, already made by me to Ely Moore, the overseer of said Samuel C. Bellamy, and for negro shoes, and rope and bagging for the present year's crop, is to be paid to such of the creditors of said Samuel C. Bellamy, as he may direct. Witness my hand and seal, this 13th day of December, 1845."

E. C. Bellamy, [L. S.]

Test:

E. Phillips,

S. W. Carmack.

Which is admitted to be the agreement entered into between them, at the time of executing said last mentioned deed.

He further avers and says, that although he cannot say positively, that he executed said last deed, in accordance with the provision in the *trust* deed, his uniform impression and belief has been, that it was then urged and impressed upon him by the said Edward C. Bellamy and his counsel that the said last mentioned deed was in furtherance of the objects and purposes of said trust deed, and not in anywise inconsistent therewith.

He further says, that as for the sum of $6000, the consideration in said deed expressed to have been paid by the said Edward C. Bellamy, the same is so grossly inadequate as to be a fraud, if there was no trust; yet the same or any part thereof, was never paid to him by the said Edward C. Bellamy at the time of the execution of the said deed or at any time since.

He further charges, that if said Edward C. Bellamy has

paid any money for the use of the complainants as the consideration of said deed, it *was made from the trust* property or funds of said complainant *already in his hands,* or while he had sufficient amount of the said trust funds in his possession and control, applicable to the discharge of such debts.

He further charges, that if said last mentioned deed is claimed as an absolute conveyance, it is wholly without consideration and void.

He further charges, that the said Edward C. Bellamy should in a Court of Equity, be decreed to be a trustee for the said property and for the due management of the same, and for the rents, issues and profits thereof made, and which under due and proper care and management, ought to have been made, so far as the same conveys property not conveyed in the trust deed of November, 19th, 1844.

Lastly, he charges violation and dereliction of his duty as trustees, to the great detriment and destruction of the funds, and to the great injury of the complainant and his creditors.

The prayer of the bill was, that he, the said Edward C. Bellamy, be declared a trustee of and concerning the property mentioned and specified in the deed of 1845, and that he render a full, true and perfect account in detail, of all and singular the trust property and funds committed to his charge, and the rents, issues, profits and proceeds of every description issuing out of the same, or accruing therefrom, which he or any person for him, or by his consent or procurement, received therefrom, or which he might, could and ought, by proper management, diligence and care, to have received therefrom; and that the said E. C. Bellamy be removed from his said trust, and ousted of his

said trust estate, and be enjoined from all further interference with, or any control over, and management of the said trust property.

That the creditors specified be made defendants, and required to answer and set forth respectively the situation of their claims, &c. And that a receiver be appointed, to act as trustee, to receive and take possession of said plantation, slaves, &c., to provide for, keep up, maintain, manage and control the same, &c., and pay the clear residue after paying expenses, &c., to the creditors of complainant; and also to arrange with the Union Bank, so as to reinstate the said stock loan and continue the same, according to the charter of said bank. And finally, after the purposes of said trust shall be accomplished, by the discharge of the debts, to deliver to him said property, real and personal, &c., and general prayer for other and further relief, &c. It does not appear in the record whether any of the defendants excepting Doctor E. C. Bellamy, were ever served with subpoena, or made any appearance or answer; there is no decree *pro-confesso*. The defendant Doctor E. C. Bellamy's answer, so far as we think necessary to extract from it, it is in substance as follows:

"That he was an endorser, at the request and for the accommodation of said complainant, on a note payable to the Life and Trust Bank, and also a note payable to said Miles Everett. That some time in the fall of 1844, the said complainant came to the house of this defendant, and informed him that he was so much involved that he could not go on with his business, and that unless he made a deed of trust for the benefit of his endorsers that this defendant as well as other endorsers, would lose money by him. That this defendant being anxious to secure himself

against losses on account of his endorsements, upon being informed of the embarrassments of the complainants, readily agreed to accept the security and indemnity proposed by him. That complainant procured the deed, exhibit A B, and brought it to this defendant to sign, telling this defendant that it was a deed of trust for his (this defendant's) security, and for the security of other preferred creditors therein named; and this defendant presuming that it would secure the objects avowed, executed and accepted it.

"That at that time there were executions of the existence of which he avers, he, this defendant, was ignorant, for a large amount, say from $6000 to $8000, in the hands of the Marshal against the said complainant; and to the great surprise and astonishment of this defendant, the amount of $4000 or more of said executions was soon after levied upon all the mules, horses, and what the Marshal estimated to be about 75 bales of cotton, then in the field, it being a part of the property in said deed of trust. That after said levy, being urged by the complainant and fearing he might make himself liable to the other *cestuis que* trust, in said deed, by neglect of duty as trustee, he interposed his claim in that character, to the property levied upon, and gave bond and security as is directed by law in such cases, determining in this manner to submit the said deed of trust to judicial investigation and construction.

"That things remained in this position until the fall of 1845, in which year *"this defendant went on to make the crop, paying the overseer and other expenses for negro clothing, bagging and rope, &c., out of his own money."* That as soon as the crop was fairly made and about 50 bales picked out, the Sheriff of Jackson county levied *two* other

executions in favor of Sullivan's administrator and Miles Vance, amounting to about $4000, upon all the crop of cotton of the year 1845, and *all the* other property in said deed of trust, except such as had been levied upon before.

"That he put in a claim also for this property, and that at the next term of the court these claims were tried, and this deed of trust, attacked by said judgment creditors was determined fraudulent and void as to said creditors, and this property was found subject to said executions, and he *"alleges that said deed of trust was fraudulent and void ab initio, as to execution creditors existing at the time said deed was executed, and that being void in part it is void in toto."*

"That after said property was so found subject as aforesaid, that he returned it all to the Sheriff, except the two lots of cotton of 42 and 62 bales, and that it was sold by the Sheriff to satisfy the executions in his hands so levied as aforesaid.

"That instead of there being 75 bales, when ginned, in the first lot of cotton levied by the Marshal, there were only 42, which were sold by this defendant, and the Life and Trust Bank debt paid with the proceeds.

"That the 62 bales were sold by this defendant and the proceeds applied to the payment of the said executions of Sullivan and of Vance. That having thus shown what became of all the property conveyed in said deed of trust, he denies that the right and equity of redemption which was afterwards conveyed in the deed of 1845, was *intended* to be conveyed in said deed in trust, under the general terms therein employed, to wit, "all his personal effects of every name, nature and description," as is alleged in said bill."

"This defendant further answering, says: "That in the

early part of December, 1845, he was in Tallahassee, for the purpose of procuring a judgment against him as endorser, and the said complainant as principal, which had been rendered against them in the court below, in Jackson county, and which had been affirmed in the Supreme Court, so that it might be placed in the hands of the Clerk of the Inferior Court, and an execution issued thereon, for the said complainant was in a failing condition; and this defendant finding that he had leaned upon a broken reed, when he reposed upon said deed in trust for security as the endorser of said complainant, was anxious to take every step by which he might even partially indemnify himself for the heavy liabilities he had incurred, as endorser and security for said complainant. When this defendant returned from this mission to Tallahassee, he found the said complainant and Judge Carmack at his home; and the said complainant notwithstanding all the trouble and difficulty in which he had already involved this defendant, insisted upon making another "deed in trust," but this defendant *promptly and positively refused to have anything more to do with "deeds in trust," or anything of the kind.* preferring to run the risk of losing the money he had advanced for the said complainant, and also what he was liable for as his endorser and security, rather than have anything more to do with "trusts," or rely again on ropes of sand. The said complainant, still professing a great desire to secure his endorsers against losses on his account, this defendant said to him that he, the complainant, still had a remaining interest in some property mortgaged to the Union Bank of Florida, which at that time, as the defendant was advised, was not subject to execution, the statute authorizing the sale of equity of redemption under execution not then being enacted.

"This defendant further said to the said complainant that if he was serious in the desire to protect him against liabilities as his endorser, and would, in good faith, sell him his remaining interest, or equity of redemption, in so much of his, the said complainant's bank property, as would be sufficient to cover the advances and liabilities which this defendant had incurred for the said complainant, and some other debts, about which the said complainant expressed great anxiety, that this defendant would go to some estimate of the value of the interest in the property agreed to be conveyed, and also an estimate of the amount of debts desired by the complainant to be secured. At this time a suit was pending against the said complainant by the Union Bank for a large amount of money theretofore loaned to the said complainant, and it was then the general impression in the country that the property mortgaged to the bank would be subject to execution to satisfy judgments obtained by said bank in such cases; and the artful "and designing complainant," finding that this defendant could be no longer duped into a participation in fraudulent deeds of trust, and fearing that his mortgaged property would be sold to satisfy the said debt for loaned money, which would soon be matured into judgment against him, in favor of the bank, he, the said complainant, without any undue influences upon the part of this defendant, and with a full knowledge of the situation of his affairs agreed to convey to this defendant all his remaining interest in so much of the said bank property, as would be sufficient to secure this defendant against his said liabilities on the said complainant's account, and certain other debts, about which the complainant expressed great solicitude and anxiety as aforesaid. That thereupon

the said complainant and this defendant left this defendant's house, in company with Judge Carmack, and went to Marianna for the purpose of effecting the conveyance of the said interest of the said complainant in a portion of the said mortgaged property as above indicated. The said complainant furnished a list of the slaves and land, his interest or equity of redemption in which was intended to be conveyed, and a description of the same and the Hon. Samuel Carmack, who was employed by the said complainant for that purpose, drafted the deed of conveyance. After the conveyance was drawn, the complainant came, in an intoxicated state, before defendant and the said Carmack, and signed the same; but this defendant positively refused to accept the delivery thereof, on account of its being signed and sealed by the complainant in the situation in which he then was. The complainant then came back on the following morning in a sober and rational situation, and executed a newly drawn deed, the same in substance as the one he had signed the day before, which last deed as well as the former, was drafted at the request and under the direction of the said complainant. This defendant accepted the delivery of the last mentioned deed of conveyance referred to in complainant's bill of complaint, and therein designated as exhibit B.

"As to the consideration mentioned in said deed, to wit, the sum of six thousand dollars, this defendant alleges that it was sufficient, adequate and equal to the value of the interest conveyed by the said complainant in said deed.—Said deed purports to convey the equity of redemption of the said complainant to this defendant in twelve hundred acres of land, and sixty-five slaves. It was found, however, that one of the slaves mentioned in said deed, value a-

bout dollars, was not included in the bank mortgage, and there being no incumbrance on him, he was taken in execution to satisfy the debts of the said complainant, and sold by the Sheriff for that purpose. Of the sixty-four which remained, one old man has since died, and eight of them are perfectly worthless, by reason of consumption, dropsy, deformity from sickness, burns, and chronic rheumatism, with which diseases, &c., they were afflicted at the time of said last mentioned conveyance, and so far from their being valuable or profitable, they are an expense to the plantation.

"Thirteen of the said number of sixty-four slaves are children, under the age of nine years, and about eight of the number were from forty-five to seventy years old, and about eight or ten others ranging down from five to ten years of age, at the time said conveyance was made. This defendant alleges that taking all said slaves as a gang, they were not likely, are altogether an expensive set to support, and they were not at the time said conveyance was made worth upon an average, as he believes, more than about two hundred and fifty dollars apiece. This defendant further alleges, that of the lands included in said conveyance, much lies in the swamp and in the woods, and if it had been unincumbered and sold at public sale, it is not reasonable to suppose that it would have brought more than the adjoining land of equal, if not superior quality, on three sides, which sold on a credit of one, two and three years, at from a little more than one, to three dollars and fifty cents per acre. The amount of said complainant's subscription for stock in the Union Bank for which said property had been mortgaged, was about thirty-two or three thousand dollars, and the amount of

the judgments which were soon after rendered against the said complainant in favor of said bank, for money, in the Circuit Court for Jackson county, was about twenty-seven thousand dollars, as this defendant is informed and believes. This defendant purchased said property, subject to both these claims, amounting in all to about sixty thousand dollars, under these estimates, or any reasonable estimates which could be made of the value of the property in said conveyance mentioned, and of the amount of incumbrance which said Bank had upon said property.

"This defendant confidently alleges that the consideration mentioned in said deed of conveyance to him is full, adequate and altogether sufficient for the interest (it being a mere equity of redemption) in said property, which the said complainant conveyed to him in the deed of the 13th day of December, 1845, as mentioned in said complainant's bill of complaint. This defendant positively alleges that the said last mentioned deed had no connection whatever with the said deed of trust of the 19th November, 1844, but was wholly distinct from, and independent of it. That while the trust deed of 1844 was tainted with fraud, the deed of 1845 was made for a good and valuable consideration—was honest and *bona fide* in all respects, free from fraud, secret trusts and all other fradulent contrivances—was made without any undue influence or unfair practices upon the part of this defendant, and executed by the said complainant, after due reflection, and in a sober and rational state of mind, and was drawn up and prepared by a legal gentleman, employed by the complainant himself for the purpose, a gentleman whose heart is too pure, whose nature is too honest, whose intellect is too clear, and whose legal learning is too accurate and pro-

found, to have allowed him on the one hand to have become the instrument of fraud, or upon the other to have made a blunder in conveyancing, at which a mere tyro would be ashamed. This defendant having become the purchaser of the said complainant's equity of redemption in the property described in the said deed of the 13th December, 1845, gave the complainant his obligation to pay off and discharge *all the debts* of the said complainant for which this defendant was liable as endorser or security, and also certain other debts mentioned in said obligation, and which was designated by the said complainant, which said debts in all amounted at least to the sum stated as the consideration in said deed, if not more. If less than $6000, this defendant was to pay other debts to the said amount."

He further says, that since that time, he has paid up the greater part of the debts mentioned in the said obligation and that he is ready to pay the balance which may yet remain unpaid.

That this defendant has time after time, offered to rescind the whole contract upon being indemnified for the monies paid and the liabilities incurred by him for and on account of the said complainant.

He further says, that if he did not pay interest on the Union Bank debt of the said complainant under the said deed of trust of 1844, it was because he had no means in his hands as trustee to pay the same; and this defendant further says, that after said deed in trust was decided to be fraudulent and void, this defendant had nothing more to do with it, *and could not be compelled to act under it.*

In behalf of complainant, Joseph W. Russ testifies:—"That his plantation adjoins the Rock Cave plantation,

that they lie side and side for about a mile. Has been living there before and ever since Samuel Bellamy owned the place. That he has been well acquainted with the plantation and negroes of Samuel Bellamy, but not so well of late, since it went out of his possession. It was looked upon while in the possession of Samuel Bellamy by witness and everybody else who knew it, as *one of the finest plantations in the* country. That witness had rather have it than any plantation he knew of for the number of acres. Samuel Bellamy made fine crops there—that he made from 250 to 300 bales of cotton per year, and one year witness thinks he made over 300—bales were the same size as usually made in the country, they were formerly not so heavy as at present—from 500 to 600 lb. bales are usually made now, some as high as 700. Samuel Bellamy made full provision crops—does not know that he sold any.

"That in the fall of 1845, the Rock Cave plantation would have sold for as much as any land in the country—does not know what land was selling for at that time—thinks there were between 1000 and 1200 acres of cleared land, and when in possession of Samuel Bellamy the houses, fences, and other improvements were in good order and fit for use—*thinks the negroes were first rate negroes, as good* as any in the county. That he lived by them a long time, and found them honest and peaceable, and manageable and healthy as any other negroes."

R. B. Carlton, another witness in behalf of complainant, states: "That he came to this country with Samuel C. Bellamy, and overseered for him in the years 1836, 1837, 1839 and 1840, that he was well acquainted with the character and value of Samuel C. Bellamy's negroes, and that there were 40 working hands at the time he overseered for

him, *and were as valuable a set of hands as any in Jackson county.* That he settled the plantation, and cleared most of the land; that there were a good many likely young hands growing up at the time. *The land was very* good, and Samuel C. Bellamy once in his presence, refused $20 per acre; and witness considers it would make as much per acre as any land in the country, and that he has made it; that he has had a good general knowledge of the plantation since, and especially since 1841, and also of the hands, and has been there as often as once a week since that time.

"That since the plantation has been in the possession of Edward C. Bellamy for the last year or two, it has gone down to nothing. That since the negroes went out of the possession of Dr. S. C. Bellamy, witness had seen them frequently, but the present year he had not seen them much, except a few of them. That since they had gone out of Dr. S. C. Bellamy's possession he had not seen any of them well clothed, that they appeared poor and scrawny, and he frequently met them on the road and did not know them as some of the negroes he came from North Carolina with."

Hugh Spears, a witness also for complainant, testifies:

"That he is well acquainted with the Rock Cave tract of land, he supposes there are 1000 or 1200 acres—a good deal of swamp and ponds on the tract—*that in* 1845 *about* $6 *per acre would have been a fair cash price for the plantation, land being then low.*"

Judge Baker, a witness in behalf of said defendant, says in his answer to 10th cross interrogatory: "I was present when the value of Dr. S. C. Bellamy's property was spoken of. I do not remember what was said by each in-

dividual. I can only state that when $6000 was stated as the consideration in the deed, it was signed by Dr. S. C. Bellamy without objection. I have already stated that he was *not intoxicated* when he signed the deed; so far as I was capable of judging, *he seemed to understand what he was about.* I do not know that others were consulted about the value of the property. Judge Carmack thought that $6000 was as much as the property would bring at a cash sale, over and above the liens and incumbrances n on it. I was under the impression that the consideration in the first deed was $6000; in this, however, I may have been in error."

In his answer to the 11th he further states: "Judge Carmack advised E. C. Bellamy to buy the property, as I have before stated. He moreover advised them not to have a private understanding, either verbal or in writing. He probably meant by this advice to guard them against just such a suit as the one now pending."

In another place, in his answer to 69th cross interrogatory, he says: "*Judge Carmack seemed to be the friend of both* Samuel and E. C. Bellamy." Judge Carmack in his deposition read in evidence by the defendant, in speaking of the deed of 1845, of which he is interrogated, states: "That the deed was drawn by witness at the instance of Edward and Samuel Bellamy. That as well as witness can state at this late day, after so long a lapse of time, that after the deed of trust of intended to secure Edward Bellamy and others, had been overruled by the court and declared fraudulent and void, and the decision acquiesced in by the lawyers who defended it, Samuel C. Bellamy detained witness two or three days in this county consulting him about the matter, (Edward Bellamy not being

present at the conferences, and as witness believes he was then absent, where he does not remember.) Witness was detained, as well as he recollects, after the plan had been settled, until the return of Edward C. Bellamy, that witness might assist in consummating the plan.

"That another important circumstance in declaring the old deed a nullity, fraudulent and void, was, according to his recollection, that it was for a very long and indefinite period of time. That when consulted by Samuel C. Bellamy, he avowing *it was his object to keep his property together,* witness told him it could not be done by a deed of trust, unless it be forfeited in some reasonable time. That in this matter of the deed annexed, *witness told Samuel and Edward Bellamy to have no secret understanding, either verbally or in writing* and that Sam must trust to Ned's generosity. And witness had no doubt he did so, and thought that Edward Bellamy would return Samuel his property after he had paid his debts; this, however, is mere matter of opinion, but nothing to warrant such an opinion passed at the time of the execution of the deed, and not for some time after. Nothing but their relationship, and Sam's willingness to trust his brother with the possession and control of his property, induced this opinion.

"That the reason of the great haste to execute a conveyance of some kind to somebody, that would stand, was because the newspapers stated that there was a bill before the Legislature to sell the equity of redemption, and witness gave it as his legal opinion that the executions would be a lien upon the equity, and would postpone any sale or conveyance made after the lien attached. The two matters of fact most constantly in witness' mind at the time of the execution of the deed and since, was witness' repeated

advice to both Edward and Samuel Bellamy that they should have no secret understanding, or trust that this property should ever be delivered up to Samuel C. Bellamy, and both of them protested that there should be no such agreement or understanding. The other fact is that witness told Samuel C. Bellamy *that he must leave* the plantation conveyed in the deed, and to exercise no control over it, or any negro conveyed in the deed, and he agreed to do so. That witness advised them both that Sam should sell out for a full, fair and equate consideration, or words to that effect.

The deed was executed in Gen. Baker's office, at Marianna, and both parties were present at the time of execution. And said deed was undoubtely intended by complainant and defendant as an absolute and unqualified conveyance. That both parties were friendly at the execution of the deed, but witness does not recollect the particulars of the conversation; thinks they conversed as much about other matters as about the deed; that from *their conversation witness judged that Sam. had* unlimited confidence in his brother.

At the time of the execution of said deed, Samuel C. Bellamy *was neither intoxicated nor deranged,* but, that he reasoned like a man who had a *purpose* to carry out, and was capable of appreciating the most effectual means for carrying out that purpose. That he reasoned accurately and well, as witness thought. And that as to his insanity, though witness lived in the community, he never heard it suggested till long after this period. There was no connection whatever between the said deed and the trust deed of 1844, so far as the parties themselves understood it; on the contrary, the parties themselves knew the fact to be,

that the old deed had been declared fraudulent and void by the court, and that their counsel did not hesitate to advise them not to carry it to the Supreme Court; the deed being hopelessly void and fraudulent. That the complainant and defendant said nothing about any connection between the two deeds that witness heard.

Edward C. Bellamy was to pay six thousand dollars of complainant's debts, most or all of which he was responsible for as complainant's security, and this was the consideration of the deed.

In reference to the testimony of Judge Carmack, a letter from John Tanner, the Examiner, and which is found in the record, states: That soon after his appointment to take testimony in this case he called on Judge C. to take his testimony, and he was so ill that he had to call several times before he could complete his answers to the direct interrogatories, and when he went to examine him upon the *cross interrogatories found him dead.*

Dr. Philips, on being asked whether or not the said Samuel C. Bellamy was, at the time of the execution and delivery of said deed, of sound mind and capable of thinking and acting in the ordinary affairs of life?

Answers: *"I think he was."*

Again, he says: "That for about a year before the execution of the said deed, I know that he was very much harassed and his habits were intemperate; that he was melancholy and violent in his temper, but when sober, I thought him capable of transacting business."

"A short time before the execution of the deed of 1845, Edward Bellamy did say to me in presence of Sam. that he had been pointing out to Sam. *how he could secure both of us.*"

"The only consideration which I saw was the obligation

of Edward Bellamy to pay certain debts of Samuel Bellamy to which he and myself were sureties. I don't recollect whether I witnessed it or not, nor do I remember certainly that it was delivered to Sam, but think it was delivered to Sam."

"The contents of the consideration, as near as I can recollect, Edward Bellamy obligated himself to pay a debt to Miles Everett of about a thousand dollars, to which he was security; also a note of Sam's to the Life and Trust Bank, to which he was security for about twenty-five hundred or three thousand dollars, a note to William J. Baker, to which I was security for about three hundred dollars."

In the testimony of John T. Myrick, the Deputy Sheriff, there is a list of judgments and executions vs. S. C. Bellamy—of these, the following were before the 19th November, 1844, the date of the execution of the trust deed, to wit: Perkins, Hopkins and White, judgment 6th June, 1843, $212.38.

John W. Southall,	judgment	19 Oct., 1843,	$275.25
Green Mitchell,	"	9 June, "	676.01
John Brett, Jr., for use &c.,		19 Oct., "	1430.86
N. C. Robbins,	"	27 May, 1844,	2703.63

Among the receipts filed by defendant, appears that Robert Myers, Marshal, held an execution on judgment of Isaac Widgeon, of 19th Oct., 1843, for $309.45.

The following judgments also appear which were recovered between the first and second deed, to wit:

The Union Bank,	judgment	8th May, 1846,	$27,710.64
Wm. Sullivan, Adm'r,	"	27th Nov., 1844,	3,320.67
Miles Vance,	"	20th, " "	322.36
Geo. A. Croom,	"	2d Dec'r, 1845,	1,160.36
Hugh Spears for use &c.,	"	22d Nov., 1844,	1,122.92

Samuel Stephens, the Sheriff, testifies: That he made a levy on Executions in favor of said Miles Vance, and Sullivan's Administrator (when this levy was made don't appear, but it must have been previous to December Term, 1845,) he says, however, he was Sheriff at the time of the sale in 1846, which took place, according to the testimony of Mr. Myrick, the first Monday in January, 1846, on Executions in favor of Sullivan's Administrator and Miles Vance, an account of sales of which appears in his testimony marked Exhibit X.; and at that sale the said Edward C. Bellamy bought cotton, hogs, corn, cows and calves and cotton seed, his bids amounting to about $1800.

Mr. Myrick also testifies that D. Pittmann, as Deputy Marshal, made a levy for the sale stated in paper Y on executions in favor of Perkins, Hopkins and White, Southall, Brett and Mitchell, which must have also been before December court, for he says: the right of property was tried in December. At this sale Edward C. Bellamy bought mules and horses amounting to

Mr. Stephens further testifies: "That he had a conversation with Dr. Edward C. Bellamy before the sale—about the time of the sale, and after the sale—*that he understood from E. C. Bellamy that he had bought the property* at the sale for the *purpose of keeping the property together, and keeping up the farm to aid his brother, Samuel C. Bellamy.*" Witness thinks he understood it from him several times in this way: witness thought his language applied to *all he bought in.* He thinks these remarks were made to him at Rock Cave while he was delivering the property to him, and also probably in town; he delivered him stock cattle, stock hogs, meat hogs, corn and seed cotton in the gin house. All these he delivered to E. C. Bellamy at the plan-

tation. Witness did not understand Dr. Edward Bellamy (in his presence) to claim the property purchased *at the sale for his own benefit.* Witness was of impression before the sale that Dr. Edward C. Bellamy was going to purchase this property for *Samuel C. Bellamy, and was of that impression all the time."*

"That he received the impression that Edward Bellamy was going to buy the property at the sale for Samuel Bellamy, *from conversations with Edward Bellamy,* and this witness thinks, *was the general impression,* and several persons told him they would not bid for the property because they thought it was going to Samuel Bellamy's benefit."

Witness Myrick further says: "He does not think the negroes in paper Y brought near their value—the other property did not bring its full value he thinks; does not think the other property so much out of the way; the mules came nearer the mark."

"That about the first of February, 1846, S. C. Bellamy was complaining to him, witness, of E. C. Bellamy and witness told E. C. Bellamy of it, and he requested him to quiet S. C. Bellamy—that he was doing all of this business for S. C. Bellamy's good. I told Ned Bellamy that Sam Bellamy had complained to me—that he believed Ned Bellamy was going to take his property from him. I told him this about the time the bill of sale for the negroes was made to William Bellamy, and this was the first time I heard of any dissatisfaction on the part of S. C. Bellamy about the property."

"Edward Bellamy replied *that he was doing it all for Sam's good,* and asked me to *quiet* him; by dissatisfaction before mentioned, witness means that S. C. Bellamy was not dissatisfied with E. C. Bellamy because the bill of sale was

made to William Bellamy, that was what he wanted done in paper marked X."

"That the complaints which witness mentioned as coming from Samuel Bellamy were about *the whole property* which Edward Bellamy had got from Samuel Bellamy, and which complaints witness communicated to Edward Bellamy, and it was to *these* that Edward Bellamy made the reply before stated."

"That Samuel Bellamy and Edward Bellamy had quarrelled about the last deed which was drawn by Judge Carmack, and *before then,* witness had thought that the property had been bought in by Edward Bellamy for Samuel Bellamy, and *after* that quarrel commenced, Edward Bellamy told him that the property he bid off on the first Monday of February he had bought fairly, and he *meant to keep it,* except the five negroes."

The witness Russ testifies, that he "was present in town when Samuel Bellamy's stock was sold, in Marianna, under levy. Thought the property sold very cheap, there was not much competition, persons did not bid freely; that E. C. Bellamy, he thinks, bought most of it. Did not observe that persons were less disposed to bid against Edward Bellamy than others. Witness thought that Edward Bellamy was trying to keep Samuel Bellamy out of his difficulties, and a *great many persons thought so,* and such was the general impression, so far as witness knew, but does not know that his own, or the general impression was correct. There were at the sale alluded to, some persons who bid against E. C. Bellamy. The property he saw sold, cheap, for *less than he thought the value of it.*"

April 10th, 1845.

"Memorandum of an agreement entered into between Ed-

ward C. Bellamy, trustee of the property of Samuel C. Bellamy, of the one part, and E. P. Moore, of the other part witnesseth: That the said E. P. Moore, is to do the duties of an overseer on the plantation of the said S. C. Bellamy faithfully, and to give prompt and ready obedience to all orders of the said E. C. Bellamy, in regard to the business of said plantation. And the said E. C. Bellamy, as trustee aforesaid, agrees to pay the said E. P. Moore the sum of three hundred and fifty dollars out of the crop made on said plantation; but in no event is it understood between them that said E. C. Bellamy is to pay the said Moore out of his own money, but as trustee as above mentioned; the said Moore to do the duties from the 1st of January up to the 1st of December, and to be furnished with board for himself and horse during the time."

E. C. Bellamy, Trustee.
Eli P. Moore.

There was much additional testimony, which we have gone over with great care; but we do not think it materially varies the case.

The following decree was made in the Circuit Court sitting in Chancery, from which decree the defendant below, Dr. E. C. Bellamy, appealed to this court.

IN EQUITY—WESTERN CIRCUIT,
Jackson County—Fall Term, 1850.

Edward C. Bellamy, et al., Def'ts,
and
Samuel C. Bellamy, Complainant,
} Bill for Acc't Relief, &c.

This cause came on to be heard at the Spring Term, 1850, of this court, before the Hon. George S. Hawkins, Judge of the Western Circuit, upon bill, answer of defen-

dant, Edward C. Bellamy, replication, exhibits, and proofs taken in this cause, and the same having been fully argued by counsel for both parties, and the matters in dispute fully considered, and the judgment and decree to be given in the premises fully advised of, his Honor doth think fit, and so orders, judges and decrees:

First—That the deed of conveyance of the said complainant to the said defendant, Edward C. Bellamy, bearing date the thirteenth day of December, in the year of our Lord, one thousand eight hundred and forty-five, (1845), mentioned in and exhibited with said complainant's bill of complaint, for the reasons at large set forth in the opinion delivered in this cause, was and is wholly inoperative and void and that the said Edward C. Bellamy should and ought to account for the trust property and funds conveyed by and possessed under the trust deed from the said complainant to the said Edward C. Bellamy, bearing date the nineteenth day of November, in the year of our Lord one thousand eight hundred and forty-four, also mentioned in and exhibited with complainant's said bill of complaint.

Secondly.—It is further adjudged and decreed that the said defendant, Edward C. Bellamy, holds that portion of the trust property and profits and issues thereof, purchased by him at the sales under execution by the Sheriff of Jackson county on the first Mondays of January and February, 1846, subject to the uses and trusts limited and appointed in the aforesaid deed of the nineteenth of November, in the year one thousand eight hundred and forty-four, and is liable to account therefor.

Thirdly—It is further ordered and decreed that the defendant, Edward C. Bellamy, account before George F. Baltzell, Esq., one of the Masters in Chancery of this Court,

upon and at such time as shall be appointed by said master, of and concerning the aforesaid trust and the execution thereof, rendering a full, true and perfect account in detail of all and singular the trust property and funds committed to his charge, and the rents, issues, profits, crops and proceeds issuing out of the same, or accruing therefrom, which he, or any other person for him, or by his consent or procurement, received therefrom, or which he might, could and ought, by the exercise of reasonable diligence, to have received. Said accounting to be upon due notice to complainant or his solicitor, and according to the usual mode of proceedings in the office of the master; and that said master make report of said accounting, and the evidence taken before him thereon, with all convenient speed.

Fourthly.—It is further ordered and decreed that the said Edward C. Bellamy be removed from his said trust, and ousted of his said trust estate; and that he deliver over to the Receiver hereinafter appointed all of the said trust property, and funds, and the rents, issues and profits, and crops arising from or issuing out of the said trust property, now in his hands, power, possession or control, and thereafter stand and remain restrained and enjoined from any interference with, control over, or management of the said trust property, 'til the further order of this court in the premises.

Fifthly.—It is further ordered and decreed that Frederick R. Pittman, of the county of Jackson, be appointed Receiver of this Court in this cause, upon his entering into bond in the penalty of ten thousand dollars, ($10,000,) with good and sufficient security to be approved of by the master aforesaid, and conditioned for the due and faithful performance of his duties; and that said Receiver shall, with all

convenient speed, demand and receive from the said Edward C. Bellamy, the trust property hereinbefore mentioned, and shall rent out the plantation, and hire out the slaves at public auction by the year until the further order of the court in the premises, and shall render and file in the office of the Clerk of this Court annual accounts and returns of his actings and doings in the premises, and of the amounts of funds and securities in hand.

Sixthly.—It is further ordered and decreed, that the said George F. Baltzell, master as aforesaid, do also proceed to ascertain and report to this court the names of the creditors of the said Samuel C. Bellamy, who are entitled to the benefits of the trust estate, heretofore conveyed by the said Samuel C. Bellamy to the said Edward C. Bellamy as aforesaid, with the amounts due to each respectively, and the respective order of priorities; and for this purpose the said master shall make advertisement for the presentation of such claims, within such time as he shall deem reasonable and proper in the premises.

And that all further directions are reserved until the coming in of said reports.

GEORGE S. HAWKINS, Judge, &c.

OPINION.

From the testimony in the case, it is not satisfactorily established, as charged in the bill, that the mind of the said Samuel C. Bellamy, at the time mentioned, was so affected from his habit of indulging in the use of intoxicating liquors, or from any other cause, as to render him incompetent from mental imbecility to know and perform any of the duties incident to the ownership of property, *when sober.* The important questions therefore in this case are: 1st. Whether

at the time the said deed was executed, marked "Exhibit C. D." and dated 13th December, 1845, and, whether at the time of the purchases at the Sheriff's sale in January and February, 1846, (or at either of them,) the said E. C. Bellamy had been so *divested* of his fiduciary capacity as *trustee*, &c., as to prevent all the consequences of his acting, both for himself and for the *cestui que trust*.

Secondly.—Whether, if he was not so stripped of his character as trustee, he could in law, have made said purchases, or either of them, without being subject to equities that attach to such purchases.

It becomes necessary for us in considering these questions to enquire:

First.—Whether the trust deed of 1844, was as between the parties thereto a good and valid instrument?

Second.—What property was embraced therein?

Third.—Whether the property purchased by E. C. Bellamy at Sheriff's sale was the same as that included in the deed?

Fourth.—Whether the slaves and lands, or any interest in them, or either of them, included and mentioned in the deed of 1845, formed any part of said trust?

In construing either or both of said deeds, the court is authorized in looking to the motives that led to them, and the objects intended to be effected by them; and doing this, they must depend on the circumstances at the time.

The first question to be determined under the conveyance in trust is, whether it was *void*, as between the parties, at the time said purchases were made by said Dr. E. C. Bellamy, or whether it was merely *voidable* as to creditors?

It is laid down as law in 1 Story's Equity Jur., sec. 371—"That although voluntary conveyances are, or may be void,

as to existing creditors, they are perfect and effectual, as between the parties, and cannot be set aside by the grantor, if he should become dissatisfied with the transaction. It is his own folly to have made such a conveyance. A conveyance of this sort (it has been said, with great force) is void only as against creditors; and then *only to the extent* in which it may be necessary to deal with the conveyed estate for their satisfaction. To this *extent* and this *only* it is treated, as if it had not been made. To every other purpose it is good—*satisfy the creditors and the conveyance stands.*" See opinion Yates J., in Newman vs. Kapp, 5 Binney 76, 8 Gill 501.

It is by no means certain that the conveyance now under consideration was void *at all.* It is well settled law, that a person in failing circumstances may prefer creditors. A sale, assignment, or other conveyance, is not necessarily fraudulent, because it may operate to the prejudice of a particular creditor. The delay necessarily resulting from a fair exercise of these rights is not prohibited by any statute.

The case of Ravisies vs. Alston, Trustee, 5, Ala., 302, is a case very analogous with this. In that case the court sustained the deed of trust even against a creditor and remark, '*it is not a badge of fraud* that the grantor remained in possession after the execution of the deed, as such possession, was consistent with its terms, and the debts, or a considerable portion of them to *secure which it was made, were not due.*"

That there was no time specified within which this trust was to be performed, does not strike us, as a badge of fraud. Would it not be like a note without time specified for payment?

But we do not undertake to decide whether this deed was

void or not, and for the purpose of the consideration of the matters before us, we will consider it as *voidable* by creditors.

As to the creditors then, the deed was only voidable, and the preferred creditors, though not parties to the declaration of trust, *may claim* under it. 4 John. Ch. 529.

Dr. E. C. Bellamy was himself a preferred *quasi* creditor,—by said trust deed, he became a *trustee,* not only for Samuel Bellamy, but for the *other .creditors*—he accepted the trust, and as one of the preferred beneficiaries derived benefit from it. To say, that he shall not fulfil his trust, so far as in his power to do so, would be giving the power of the court to aid him in making gain. Having accepted the trust, he could not disclaim and throw it off. He cannot set up or insist that this deed was fraudulent,—he has undertaken to carry into effect its objects and purposes.—See Strong vs. Willis, 3 Fla. Repts. 124. He was a voluntary part to it, and thereby negatives any fraudulent intent, besides both complainant and respondent, in their bill and answer *disavow* that their *object* was to hinder or delay creditors. Courts have refused relief, where the *avowed object* was to hinder and delay creditors. This was not the principal motive here, no such object was avowed, although the result might have operated delay. What is the deed? It is but a conveyance to a trustee, (himself a *quasi* creditor,) for the benefit of himself and other preferred creditors. When these debts are paid and the objects secured, the property was to be reconveyed. Such a stipulation is not fraudulent. Johnson vs. Cunningham, 1 Ala. Repts., 258.

Now this was neither illegal, immoral, or against public policy, and if the intent of the transaction was to delay creditors, it was not to hinder and delay the *final* payment,

therefore, it could only as *against them,* be illegal, immoral or against public policy. Murray vs. Riggs, 15 Johnson, 571.

The statute of Florida sustains the view here taken. It provides that conveyances to the end, purpose, or intent to delay, hinder or defraud creditors of their just debts *shall be as against* the person or persons so *intended* to be delayed, hindered or defrauded, deemed void and of none effect.—The statute on this subject in some of the States is different, for instance, in Ohio it is unlimited in its terms—ours is not. *Expressio unius est exclusio alterius.*

Great stress seems to have been laid upon the result of the trial in the claim case, and because it was on that trial decided, by the jury under the charge of the court, that said deed was fraudulent as to creditors, therefore, it was assumed said deed was void "in toto," of course void as a trust deed, between the parties, and as to the other *cestuis que trusts.*

The trial spoken of was under our statute, with regard to claims of property levied on, and the only question in issue, was, whether or not the property levied upon was subject to the executions levied.

In equity, as between the parties, the general maxim of *pari delicto* does not always prevail. Circumstances of the particular case often form exceptions, and where it is *necessary,* relief will be granted.

The following are among the cases where relief against *particeps criminis* has been granted upon the application of the grantor.

See 1 Story's Eq. Jur. sec. 380, Eastbrook vs. Scott, 3 Vesey Jr. 456. In this case the assignor (Israel Levi) was joined in the bill with one of the creditors. The Master of

the roll says, "both Levi, upon principles of public policy, and Eastbrook, as a creditor in the deed, have an interest upon that." It will be seen that Israel Levi, under a *private agreement,* executed and delivered two bonds, &c., of which the said Master of the Rolls says: "*It is impossible to deny that the bonds were a fraud upon the creditors.—The defendants admit it.*" Yet the bonds were ordered to be delivered up. See also Austin's Admx. vs. Winston's Extx., 1 Hen. and Mun. 33, Hill on Trustees 164, Williams vs. Avant, 5 Iredell 50, Starke's Extx. vs. Littlepage, 4 Randolph Repts. 372, 8 Leigh's Repts. 512.

Without commenting further on this branch of the subject, we think the trust deed of 1844, as between the parties was good and valid.

The next question is as to the construction given to the words of the deed of trust.

It is contended on the part of the appellee, that this deed did by the operation of its terms and according to the *intent* of the parties, convey all the property, real and personal, specified in the deed of December, 1845.

The appellant insists that neither by the terms of the deed of assignment, nor by the intention of the parties, was the land and mortgaged negroes conveyed therein.

It is conceded that a deed is to be construed by the *res gestae.* In looking to the circumstances and motives which led to this assignment, and the objects to be accomplished, we find, that said Samuel Bellamy was embarrassed—he was expecting executions to be issued against him—he was in possession of a plantation and negroes, and his planting interest was so extensive that he was, according to the testimony, raising from 250 to 300 bales of cotton per year, and according to the testimony of Myrick and answer of E. C.

Bellamy, there were then several judgments against him amounting to between six and $8000, and others soon to be recovered—that the interest on his bank mortgage had to be paid, &c.—he feared creditors would come down upon him before money could be realized from his crops and other sources, and by seizure of slaves, stock, farming tools and utensils, utterly prevent him from paying his debts—bring loss and distress upon his securities and endorsers and immediate ruin upon himself. His plantation and the negroes, not specially named in said deed of assignment, were mortgaged to the Union Bank—the remainder of his property was unencumbered. To prevent the sacrifice and destruction of the interests of his sureties, endorsers, creditors and himself, which would be completely effected by the breaking up of his planting operations by a forced sale of his unencumbered property, at a ruinous rate, he executed to his brother this trust deed.

The defendant says, "That being anxious to secure himself *against losses* on account of his said endorsements, upon being *informed of the embarrassments* of the complainant, *readily agreed to accept the security and indemnity proposed, and this defendant presuming that it would secure the objects* avowed, *executed and accepted it.*"

Here then we have the motives and objects declared on both sides, and distinctly understood—on the one side it was "to save *loss* and *distress*"—"to prevent breaking up his planting operations"—"*to save his property from sale.*"—On the other, it was to obtain security from loss, and the security and indemnity proposed was accepted, to secure the "*objects avowed.*"

For which objects the said S. C. Bellamy sells, grants, bargains, conveys, assigns, transfers and *delivers* to E. C.

Bellamy "all the property and *estate,* hereinafter described and specified, to wit:

The following slaves, (naming them) also his stock of horses, mules, cattle and hogs, together with his household and kitchen furniture, and all his *personal effects* of every name, nature and description, corn, wagons, carts, &c. Also his crop of cotton of the present year, whether now in bales, in the gin house, or in the field, &c.—that the *aforesaid* Edward Bellamy shall have and hold the aforesaid *property,* upon the following trust, and for these interests, objects and purposes hereinafter set forth, that is to say, that the said *Samuel C. Bellamy shall continue and remain* in possession of all this property and effects *above specified,* &c. That the said *Edward C. Bellamy* shall receive all the rents, profits, hire and income, derived from the same, to wit: the *services* and *labor* of said personal property," &c.

Let us here make a rest, and go back and see what the "*services* and *labor* of said personal property above specified" would amount to. Upon reference, we find there were *five* slaves *specified,* to these add *horses* and *mules,* and we have all the "*specified* personal property," from which, with the bridge contract, after paying necessary expenses, the said Edward C. Bellamy was "*to reimburse, secure* and *indemnify,* &c., and to pay the judgment debts which were then due and of record, some of which had been recovered for several months, and as Samuel C. Bellamy informed him constituted the "*embarrassments*" that must be settled to prevent a *sale* and the breaking up of his planting operations, and for the paying, with all due promptness, the interest on the bank stock.

Now it cannot be supposed that any two men in their senses would have intended, with such objects to accom-

plish, this assignment to cover no *other property* than that specified.

To return to the said trust deed. We find it further stated, as follows: "and it is herein *further provided,* that all the future cotton crops made on said *plantation* shall be appropriated by said Edward C. Bellamy, trustee, to the *purposes* and *objects* above set forth and declared, especially the *interest on the Union Bank Stock,* excepting part of said cotton crop as well as corn, *also* hereby conveyed, as shall be requisite for necessary expenditures and subsistence." What "plantation" is here spoken of? We do not find that "plantation" is referred to any where else in the deed—the words "*estate*" and "in the field" are mentioned. Why so particular as to specify *twice* in said deed the payment of the "interest on the Union Bank Stock?" Did it matter as to the specified property, whether the interest was paid or not? Was it not important as to the planting interest—the raising of future cotton crops that said "interest on the bank stock should be paid?"

E. C. Bellamy, when the objects of the trust should be accomplished, was to return to S. C. Bellamy "all the property conveyed by the said deed, and all his interest and right therein either in *equity* or at *law.*" .Take away an inest in the mortgaged property and what did they mean by the term "in equity?" Retain an interest in the mortgaged property and the expression is reconcilable.

Again, we think we can see here an *intention* to assign in this trust, something beyond the *specified* property mentioned in said deed.

The words of the deed itself, viz: "all his personal effects of every name, nature and description" would, according to the general rule, embrace only things, *ejusdem generis,*

with those which have been mentioned before—those which might not have been supposed to pass under the words there made use of. Cavendish vs. Cavendish, 1 Bro. Ch. Repts. 468 and note (a) Burney vs. Rout 7, Taunton 79, Ingell vs. Nooney 2, Pickering 365. Applying this rule to this deed we think the mortgaged slaves and other personal property passed under said deed of trust, but that it did not convey the Equity of Redemption in the land.

It is essential to the conveyance of real estate, that there be some description of the land. This ingredient is wanting in this conveyance. "All the future cotton crops made on said plantation" are conveyed. By referring to the first part of the deed we ascertain, on what land these crops are to be made; it was on the land where the "crop of cotton of the present year" "in the field," was, and this inference is supported by the bill and answer.

It is insisted with much earnestness on the part of the complainant, that this conveyance of "future crops" passes the equity of redemption in said land. We do not think so. In our opinion it was only a license or conveyance of all that was necessary to the management of the plantation and appropriation of said crops, and for this purpose he was entitled to enter upon said lands, either in person or by overseer, (as it seems he did in the employment of Moore,) gather the crops of cotton, and take possession of them. The objects were that he, E. C. Bellamy, was to manage the plantation, have such an interest in and control over, the future crops grown on said plantation, as to save and protect the same from levy under execution, and to sell them for the purpose of fulfilling the trust.

We do not consider it important to the trust, how great

an estate was conveyed, whether a fee, or only an estate for a specific object. In our opinion the said E. C. Bellamy had a fiduciary interest vested in him as trustee, by virtue of said trust deed, in the slaves and lands embraced in the said mortgage to the Union Bank, and in order that he might perpetuate this fiduciary interest in the *future crops,* and keep the property all of it together until the purposes and objects set forth and declared were attained, out of them, he was *especially* required to pay the interest on the Union Bank stock. Upon his paying this interest on said stock note, which was about $1700 per annum, he could not be dispossessed of the land (whether of the negroes is yet a question) by the Bank for *twenty* years; this would make the interest of Samuel Bellamy in the lands, at any rate, at the date of the trust deed, equal to a term of *twenty* years use of the property, subject to a rent charge (interest) of $1,700 per annum, and this use or interest was conveyed in said trust deed, so far at least, as to claim and receive the future cotton crops thereon. Thus construe this deed and we have a reasonable amount of property from which said E. C. Bellamy might hope to obtain the indemnity and security he was seeking.

Trustees in all cases take an estate commensurate with the object of the trust. 7 Mass. 188. And such an estate we think was vested in Dr. E. C. Bellamy in the plantation and slaves. If he did not have such an interest in said land and slaves, then the conveyance of "future cotton crops" made on said plantation, was nugatory. That Samuel Bellamy was permitted to remain in possession of the property, is not deemed inconsistent with the trust. The parties did not consider S. C. Bellamy's possession as inconsistent with E. C. Bellamy's working the slaves on the plan-

tation, for we see E. C. Bellamy on the 10th April, 1845, as *Trustee,* employing Eli P. Moore as overseer, who, without any objection from S. C. Bellamy, went on to act as such overseer. The corn, provisions, &c., necessary to provision the plantation, and to the making of the crop, *for which purpose, and not for the use of the grantor,* are reserved in the deed. Dr. E. C. Bellamy had a right to enter upon the premises at any time, for the purpose of this trust, and to take away the crops of cotton. The circumstance that Dr. E. C. Bellamy permitted his brother to remain on the premises, in the assignment, instead of being a badge of fraud, as between these parties, entitles him to commendation.

It is urged by the Solicitor for respondent, that in the conveyance of future crops, it is shown: "*that it was expected that time should be obtained to make the money to pay the debts.* Be it so; this but strengthens the view we take of the deed. Having thus determined that the mortgage slaves, and an interest in the lands, sufficient to carry out the object of the trust, were embraced in said trust deed of 1844, it follows, as a matter of course, they were thus far subjects in the deed of 1845.

We are now to enquire whether he had been divested of his fiduciary capacity, as trustee, at the time he made said purchases or either of them?

How or in what way had he been divested? Had he fulfilled the trust, and settled up his accounts? Had he paid the interest on the bank stock? Had he paid the debts as he had agreed to do? and particularly, had he applied the Bridge money to the payment of the Sullivan debt? Had he been discharged from his trust?

It is contended that the deed of 1844 was treated by the parties as void, and that as all the unencumbered property had

been levied upon, there was nothing left for the trustee to do. That E. C. Bellamy treated it as void, and insufficient for his indemnity and security, appears plausible enough. But there is no evidence, that S. C. Bellamy treated it as void. He says: "it was represented to him to be void"—"that harassed by the ruin impending, or which he supposed to be impending and near at hand he executed "Exhibit C. D."

Judge Baker, in his testimony says: "When I first heard S. C. Bellamy, E. C. Bellamy and Judge Carmack conversing, the object was stated to be to save and secure E. C. Bellamy as security for S. C. Bellamy." "The deed of trust having been decided to be fraudulent and void as against creditors, *Judge Carmack was of opinion* that the only effectual mode of accomplishing the *object* was for Dr. E. C. Bellamy to buy the property and make the best terms he could with the creditors. He so advised them."

Judge Carmack states: " There was no connection *whatever* between the said deed and the *trust* deed of 1844, so far as the parties themselves understood it." Here then is no evidence that they even intended rescinding the trust deed; on the contrary, they were separate transactions. Is there any evidence to show that either party treated the trust deed as void? Does it not all go to show they only considered it *void as against* creditors? Much reliance was placed in the argument of this cause upon the position of Judge Carmack. It was assumed, that he was the friend, adviser, attorney and agent for S. C. Bellamy alone, and therefore his acts should be binding on S. C. Bellamy. The proofs do not sustain this position, on the contrary, the testimony of both Judge Carmack and Judge Baker is that Judge Carmack was acting as the mutual friend of the parties—he was the adviser of *both* parties, and the Attorney

and agent of both parties, therefore no more effect is to be given to his acts for one, than the other. Again, the property levied upon had not yet been sold; it was not sold until one month, and two months thereafter. What do we find E. C. Bellamy doing at the sale? Does he act like a man whose fiduciary capacity was at an end? See the testimony of Stephens, Myrick and Russ. They testify that such was his conduct at these sales, as to lead these persons and the whole community to understand that he was still acting as trustee. He *purchases in the property*—tells persons that he had bought the property at the sale for the *"purpose of keeping the property together,"* and *keeping up the farm to aid his brother Samuel,"* and so marked were his acts, that according to Mr. Stephens, *"persons said they would not bid for the property because they thought it was going to Samuel Bellamy's benefit."* A short time after the sale, when told by Mr. Myrick that Samuel C. Bellamy was dissatisfied, Dr. E. C. Bellamy tells Mr. Myrick, *"that he was doing it all for Sam's good, and asked him to quiet him."* Besides, some of the monies paid for these purchases, were out of the trust fund, to wit: the bridge contract money, and other part applied on executions owned by E. C. Bellamy.

Does this look as though said trust was treated as at an end? Was not this all perfectly consistent with the trust deed? with the objects of the one, to *keep the property together,*— the other, to *secure* himself, &c.

Take all the circumstances together, and put a fair and reasonable interpretation upon the acts and transactions of both parties, can it be considered otherwise than that Dr. E. C. Bellamy continued acting and was acting as trustee at the time of the *purchases* and execution of the deed of 1845.

It may be said that Samuel C. Bellamy surrendered the first deed or destroyed it by executing the second. The answer to this is, that neither the deed nor the proof show that he intended doing so, and had he endeavored to do so he could not have accomplished it. The first deed had been duly executed and delivered, and the *trustee* had entered upon the duties of the trust under it, therefore, as to his duties it was as yet executory and not executed; a subsequent surrender or destruction of it would not *divest the estate* conveyed by it. Nelson vs. Halsey 1, John. Ch. 418.

We are therefore forced to conclude, that the interest of said S. C. Bellamy, herein declared to be embraced in the deed of 1844, vested in Edward C. Bellamy under said trust deed, for the *interests, objects* and *purposes* therein specified, and at the time of the said purchases and execution of said deed of 1845, the said E. C. Bellamy held the same, as such trustee, and that he purchased the same without sanction of any court authorizing him thus to purchase, and without being discharged from his trust.

Having decided that Dr. E. C. Bellamy was not, at the time of said purchases or either of them, divested of his character as trustee, the next question is, could he, in law, have made such purchases or either of them, *without being subject to equities that attach to them?*

It is obvious that if these purchases are permitted to stand, the *intents, objects* and *purposes* of the trust deed are defeated, and by whom? By the act of the *trustee.* He may succeed in his object of security and indemnity, but the *cestuis que trusts* are thwarted in theirs. Is this what he covenanted to do?

Dr. E. C. Bellamy entered upon the duties of this trust, with a knowledge of the trust and confidence reposed in

him. He occupied from his own choice, the position and relation of trustee, and confidential agent, friend and brother.

The weight of English authority is against the right of the trustee to purchase the estate of his *cestui que trust,* and is predicated upon reasoning, the force of which must impress itself upon every mind. To permit a trustee to purchase while he is enjoying the confidence of his *cestui que trust,* it is said, would be to license him to speculate by abusing his situation. His duty obliges him to exert all the care and industry necessary to dispose of the estate as advantageously for his *cestui que trust,* as if he were selling for himself. His interest would sometimes thwart his duty, and the infirmity of human testimony, would render it impracticable at all times, to prove its violation; hence the policy of the rule which divests him of a legal capability to purchase. The great difficulty of discovering a disregard of the rights and interests of the *cestui que trust,* induced the determination of the courts that the *trustee had no right to purchase so long as his vicarial character continued.*

It is settled law in the United States that "in all cases where a purchase has been made by a trustee on his own account of the estate of his *cestui que trust,* although sold at public auction, it is in the option of the *cestui que trust,* to set aside the sale, whether *bona fide* made or not." See note (e) (containing a long list of cases of American courts) to Fox vs. Mackreth 2 Bro. Ch. Repts. 337, (Perkins' Edition) 1 Story's Eq. Jur. sec. 332.

In some of the courts of this country, the rule has been relaxed in purchases by administrators at their own sale, and held not void *per se* but *prima facie* valid if no unfair-

ness appears. The reason given for it is, because they sell under order of the court authorizing them so to do, and account of sales is returned to the court for confirmation.

Judge Story says: "It may be laid down as a general rule, that a trustee is not to do anything which can place him in a position *inconsistent with the interests of the trusts,* or which have a tendency to interfere with his duty in discharging it." The purchase of the Equity of Redemption in the land is consistent with the objects of the trust, to wit: the keeping the property together.

Chancellor Kent asserted this doctrine in Davone vs. Fanning 2. John Ch. 268, and his judgment in that case has been pronounced to be "one of the ablest and most important ever delivered by any tribunal of justice." In some of the English cases reviewed by him, it was held, that there were exceptions to the *annulling* of a purchase. In speaking of the Chancellor holding such an exception, Kent says: "He seems to think the court are only to be satisfied that there was no *fraud in fact,* whereas it has been again and again decided *and the principle pervades the whole body of the cases,* that the inquiry is not whether there was or was not, fraud in fact. The purchase is to be set aside at the instance of the *cestui que trust,* and a resale ordered, without weighing the presumption of fraud, on the ground of the temptation to abuse, and of the danger of imposition inaccessible to the eye of the court."

The learned Chancellor refers to the case of the York Buildings Company vs. McKenzie, 8 Bro. P. C., which was decided in the English House of Lords, wherein his doctrine was completely vindicated. In this last case, the House of Lords, set aside the sale, ordering the purchaser to account for the rents and occupation in the meantime, with a lib-

eral allowance to him for his permanent improvements.

Again, it does not appear that the property bid off by the said E. C. Bellamy was purchased at its full value; on the contrary, the witnesses all agree that the goods at the Sheriff's sales sold *below their value,* and the supposition that said E. C. Bellamy was purchasing for the benefit of Samuel induced the people not to bid.

Neither are we satisfied that the consideration of the purchase in the deed of 1845 was *rdequrte.*

The Bill charges that the Bank funds might have been purchased at a *very great discount,* and this is not denied in the answer. The proofs are very defective respecting the whole of the consideration of the purchase. As to the land and negroes, Mr. Russ is conclusive, that they were valuable; he fixes no price to slaves—*"thinks the negroes were first rate negroes, as good as any in the county."* The witness Carlton also confirms this. A plantation and negroes that produce from 250 to 300 bales of cotton per year, must be considered valuable. It is very clear it would not take long to work out $6000, on such a plantation.

The complainant in this bill, charges, *"that he was not consulted or bargained with in relation to the consideration expressed in said deed."* This is not denied in the answer. The debts contracted to be paid by E. C. Bellamy were not to be paid in any specific time. It is evident then, that were *time* secured by this arrangement, the property would soon pay the $6000 debts. This is a fact considered *"plausible,"* against the consideration as stated in Barrow vs. Bailey, Fla. Reps. The weight of testimony goes to show that the amount of consideration was fixed upon between Judge Carmack and E. C. Bellamy. The defendant

in his answer, says, that Samuel Bellamy was intoxicated the day before, and then signed a similar deed, but that he respondent, would not *"accept the delivery thereof, on account of its being signed and sealed by the complainant* in the situation in which he then was." "The complainant then came back on the following morning in a sober and rational situation, and executed a *newly* drawn deed, the same in *substance* as the one he had signed the day before." It is true E. C. Bellamy says, that both deeds were drafted at the request and under the direction of the said Samuel, but the proof is that Judge Carmack was acting for *both* parties. Judge Baker is positive that the agreement contained the Southall debt, and gives very conclusive reasons why he should testify on that point, yet when we look at the agreement it does not contain that debt. Judge Carmack says the *"plan"* was agreed upon between them, but he does not say what the amount of the consideration was. There is no evidence to show that Samuel Bellamy was consulted as to the amount of consideration. Judge Carmack says, it was executed in *great haste,* they were afraid of a Bill before the Legislature, &c. Besides Dr. E. C. Bellamy in his answer, says: he had been to Tallahassee *procuring an execution* to be issued against Samuel C. Bellamy, &c. Now how could S. C. Bellamy's object to keep his property together be obtained by conveying away the whole title of it? Taking these facts together, the remark of Judge Carmack, that it was executed in *"great haste"* appears evident.

The case presents many extenuating circumstances, but they do not in our judgment wholly overcome the inequitable features of the transaction.

The conclusion is irresistible, that the deed was hastily

entered into, arising perhaps, out of a *mutual* reliance and the judgment and advice of their mutual friend and adviser, and without any intention of taking any advantage.

We are of the opinion, that the said purchases should be set aside and vacated upon the following conditions, viz: That the said Edward C. Bellamy shall be reimbursed any monies, with interest, advanced by him in consequence of said trust or purchases, such as the payment of debts, expenses or otherwise, and that all and every the security debts, mentioned in said deed of trust, shall be satisfied and paid, so that said E. C. Bellamy shall be discharged therefrom, also any reasonable costs or expenditures including reasonable fees of *two* counsel in and about this suit, and upon payment of a *liberal* allowance for his trouble in managing said estate, upon settlement of his trust accounts of all said property, *so that he may be fully indemnified,* and lose nothing excepting wherein his *wilful* neglect should make him chargeable.

That upon these conditions being complied with, the said Edward C. Bellamy, shall execute a quit claim deed, of the said property thus purchased by him, to such person as he may be directed by the court.

That if upon taking an account of any of the property thus purchased, it should appear that some of it has been disposed of by said E. C. Bellamy, he should only be debited with the price for which it was purchased, unless it is ascertained that he sold said property at a profit; if so, then at the price for which it was sold, but if the price of the original purchase cannot be ascertained, then at the value at the time of the purchase. The Master should be directed to proceed in his duties under said decree, and the Receiver required to file accounts, and directed to pay

costs and to pay over monies to said Edward C. Bellamy, or otherwise as directed from time to time. As this is but an appeal from an interlocutory decree, authorized by statute, the cause must be remanded back to the Circuit Court for further action, and the decree appealed from must be modified and altered in said court so as to conform to the views expressed in this opinion. And the costs of this appeal must come out of the trust estate.

DISSENTING OPINION.

Hon. T. F. King, Judge of the Southern Circuit, delivered the following dissenting opinion:

The objects sought by the bill in this cause are that Edward C. Bellamy, the appellant, be declared the trustee of Samuel C. Bellamy, the appellee, for certain property mortgaged to the Union Bank of Florida, the equity of redemption, in which was conveyed by the appellee to the appellant on the 13th December, 1845, by a deed absolute on its face; that the appellant be made to account for the issues and profits of said property as well as other property held by him as trustee of the appellee, under a deed of the 19th November, 1844, and that he be removed from his said trust.

A number of other persons, creditors of the appellee, are included in the bill as defendants, but none of them seems to have appeared so that this contest is confined to Samuel C. and Edward C. Bellamy.

The facts as contained in the pleadings and evidence having been fully set out in the opinion of the court, I will proceed to consider those points which I think material to the decision of the cause.

The first question that arises is as to the truth of the allegation in the bill that the property conveyed in the deed of 1845, was included in, and conveyed by, the trust deed of 1844. The deed of 1845 conveys to the appellant, Samuel C. Bellamy's equity of redemption in sixty-five negroes and twelve hundred acres of land mortgaged to the Union Bank. In the deed of 1844, there was no specification by name of these negroes nor description of this land, nor are they referred to as mortgaged to the bank, though in the deed of 1845, the names of the negroes and the boundaries of the land are fully set out. The description of the property conveyed by the deed of 1844 is as follows: "Tony, Sally, Flora, Esop, Cinda; also his stock of horses, mules, cattle and hogs, of which he is now in possession and which cannot be more particularly described, together with his household and kitchen furniture, and all his personal effects of every name, nature and description, corn, wagons, carts, &c.; also, his crop of the present year whether now in bales, in the gin house or in the field; also all his right and interest in and to the contract for constructing the bridge across the Chipola river, near Marianna."

It is insisted by the appellee in his bill and by his counsel in argument, that all his personal property whatever, passed under the general terms "personal effects of every name, nature and description." The authorities show however, that all property of the nature of that referred to in general terms does not necessarily pass, particularly when the terms are followed by specifications as in this case. The meaning of such general words in a contract is to be arrived at by measuring them with the rule of intention, and if necessary they will be narrowed and shortened so as to conform to the scope and design of the in-

strument, as on the other hand words of a signification more limited when standing by themselves will be enlarged to meet the purpose as gathered from the other words of the contract.

Was it intended then by the deed of 1844 to convey in trust the lands and negroes contained in that of 1845? It will be observed that the appellee in his bill avers that the slaves only were included in the words, "all his personal effects," &c., and at the same time he alleges that both land and negroes and all the profits from them, were the subject of the trust, and prays that the appellant shall render an account of his management of the whole. Why the land should not have been included in the deeds as well as the slaves, if both were the subject of trust, is not explained.—The land was required for cultivation by the negroes, and the negroes were required for the land and they were both included in the same mortgage to the Union Bank. The land was as such liable to the grasp of creditors as the negroes, and why he should have desired to protect the one more than the other by covering it up in his trust deed, it is difficult to perceive.

But it was contended in the argument that to give effect to another provision in the trust deed, not only the negroes must have passed but the land also, and without such a construction the objects of the trust must have failed. This provision is that "all the future cotton crops made on said plantation shall be appropriated by said Edward Bellamy, trustee, to the purposes and objects above set forth," &c. The proposition to the Counsel is true that if the ends of the trust required it, the land and the negroes both passed to the trustees as well as the crops. Green vs. Biddle 8. Wheat. 1, Earl vs. Grim 1 John. Ch. R. 494 and cases there

cited. Was it necessary then that the trustees should have them, as well as the crop? I think not. The plain reading of the clause is that the appellee should appropriate the crops to certain purposes, not make them. His trust was to apply them, when "made," and put into his hands, in payment of certain debts, and when they were so applied all was done that he had promised. There was no obligation on his part to assume the care, trouble and responsibility of managing the plantation and making the crops as well as applying them.

It appears from the answer that the appellant in 1845, made a crop with the 65 negroes, and on the appellee's plantation, which are the property conveyed in the deed of 1845, and that he paid the wages of the overseer and other current expenses of that year. It is contended that these acts serve as a guide to the intention of the parties and show the design to have been that the appellant should take this property by virtue of the deed of 1844 as well as that specified in it.

On examination of books on evidence, I nowhere find so broad a doctrine laid down as that contracts may be construed by the subsequent acts of the parties. In the case of Cooke vs. Boothe, 8, Cowp., the question was, whether in a lease with a covenant of renewal, its terms authorized a renewal in subsequent leases. The court allowed evidence to show that there had been several successive renewals, holding that the parties, by their practice, had placed their own construction on the covenant and were bound by it.—It will be observed that in this case the court was construing an ancient deed. When the same question arose in the case of Iggulden vs. May, Lord Mansfield remarked of Cooke vs. Boothe, that he thought it was the first time that the acts of the parties to a deed were made use of in a court of

of law to assist in the construction of that deed. Lord Eldon, when the case of Iggulden vs. May was before him in Chancery, 9 Ves. 325, over-ruled the doctrine in Cooke vs. Boothe, and none of the cases since, that I can find, conflict with his ruling.

In the cases cited in argument of Livingston vs. Ten Broeck 16, Johns. 22, Atty. Genl. vs. Parker, 3 Atk. 396. Atty. Genl. vs. Foster 10 Ves. 338, and Weld vs. Hornby 1 East, 199, the question was upon the construction of ancient deeds and charters in which by a well settled rule, usage may be proved to show that, which because of their antiquity cannot be otherwise understood. In the most recent case of French vs. Cochart 1 Comst. R. 96, but one of the eight judges who sat in the cause laid down rule contended for, and he relied upon the four cases just referred to. The question before the court did not require them to go so far and they held only, the contest being as to the purposes for which a stream of water was reserved, that evidence should be admitted to show that one of the parties knew at the execution of the deed, the fact of the existence of a mill and dam on the stream and of the manner the stream was affected by their use. In Bradley vs. Washington Steam Packet Co., also cited, the language of the court is "that in giving effect to a written contract by applying it to its proper subject matter, extrinsic evidence may be admitted to prove the circumstances under which it was made, wherever without the aid of such evidence, such application could not be made in the particular case." In none of these cases was evidence admitted of matters that transpired after the contract was completed to show its meaning.

After looking into the authorities I see no reason to de-

part from the opinion already expressed by this court in the case of Fry vs. Hawley, 4 Fla. R. 258, that the evidence of the subsequent acts of the parties to a contract is not admissable to construe it. It would be a novel idea indeed if when a contract is entered into and the parties have proceeded under it for some time, they disagree and refer their dispute to the adjustment of a court, the judge should be told that it is already construed by the action of the parties, and though one or both may have mistaken their rights yet they have settled its meaning by what they have done.

We cannot, then, look at the acts of the parties after the execution of the deed of 1844, to ascertain whether they meant to include in it the lands and negroes conveyed by the deed of 1845. It must be read by the covenants on its face alone. If the defendant took possession of the plantation and negroes, made a crop and paid the expenses, it was not in virtue of the authority given him by any clause in the deed of 1844, but by a mistaken construction, a subsequent agreement or a wrongful assumption of power, neither of which is complained of or is before the court.

If we consider moreover the design in making the trust as revealed by the bill and the deed, it will be seen that there was no necessity for including in it the plantation and negroes in order to reach the ends sought by the parties.—This property being mortgaged to the bank, was already secure from the grasp of creditors. The fear was as to the unencumbered estate, all of which is specified in the trust deed. The five negroes, the stock and materials of the plantation and the crop of 1844, already made could be seized at any moment by an execution. The proceeds of the bridge contract were subject to the same fate as soon as they were realized, and the future crops

soon as they were made. It was the "forced sales
this unencumbered personality, to use the words of the
ellee in his bill, that would break up his planting oper-
ns and prevent him from saving his creditors and him-
. This was all of his property in any danger and he
ered it as he thought by a deed of trust.

There is a provision in the trust deed that Samuel C. Bel-
y "should continue and remain in possession of the pro-
ty." The rule is that a deed shall be so construed that
ossible every part of it shall stand. What sense or ob-
would there have been in this clause if E. C. Bellamy
to have the possession and control of the property?

f the appellant had sued Samuel C. Bellamy under this
l for the possession of the plantation and negroes, he
ld have been met by the decisive reply "the plain read-
of your covenant with me is, that I am to keep posses-
of all my property while you are to have and protect
legal title to all my unencumbered estate, and to take
proceeds of the whole as they come from my hands and
them in the manner we have designated.

eading this deed then by the letter of its terms or by the
r guide, the scope and design of the parties, I do not see
we can say it includes the plantation and negroes, the
larger portion of the grantor's property.

he determination of this question carries along with it
argument based on its affirmation, to wit: that the pro-
y in the deed of 1845 being embraced in the deed of
4, the deed of 1845 is void, because the trustee could not
of his *cestui que trust,* or at any rate voidable at the op-
of the cestui que trust. Admitting all the property to
e been conveyed in the deed of 1844, I hardly think that
proposition so broadly stated can be applied to the facts
his case.

It is true, as a general principle, that the trustee shall not buy his cestui que trust, but it is equally true that there are exceptions to the rule, and such sales have in a number of instances been sustained by the courts. Mr. Hill, in his work on trustees, p. 535, says "such sales have frequently been supported in equity where it has been shown that the fiduciary relation of the purchaser had absolutely ceased previously to the purchase, or that the purchase was made with the full concurrence and consent of the persons beneficially interested, who in that case must of course have been competent to give their consent." The authorities he cited are Downs vs. Grayebrook, 3 Mer. 208. Randall vs. Ewington 10 Ves. 428. In Coles vs. Trecothick 9 Ves. 246, Lord Eldon held, "that a trustee may purchase from his cestui que trust, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, that the cestui que trust intended the trustee should buy, and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee." To the same effect is the language of the court in the case of Morse vs. Royal 12 Vesey 373.

The danger guarded against by the rule is that the trustee, from his relation to the property confided to him, will acquire such information of its value as will enable him to make a profit in purchasing from his cestui que trust, for if by such information he take advantage of his cestui que trust, his conduct is inconsistent with the trust, for in assuming it, he promises to make the most of it for his beneficiary. The rule is wise and salutary and has, without doubt, often prevented fraud, but when the reason for the rule does not exist, it should not be applied. It ought not to be applied when parties by an express agree-

ment or virtually have laid aside the fiduciary relation and agreed to buy and sell. They then treat with each other at arms length. If after the trust has been created, the cestui que trust chooses to create a new relation and to stand towards him in the character of vendor, I see no reason why a sale between them should not be sustained as well as one from a trustee to a third person.

The prohibition by the general rule is that the trustee shall not buy from himself. He does not do so where there is a deliberate contract of sale between him and his cestui que trust. Nearly all the cases on this subject in the books, are where the trustee at public sale has bought property entrusted to him with directions for its sale, either to pay debts or to make distribution. Such was the purpose of the trust in Davon vs. Fanning 2 John Ch. R., decided by Chancellor Kent, and in all but one of the leading English cases which he there reviews. In all of them with two exceptions, in one of which the sale was sustained, the purchase or other transaction of the trustee in regard to the trust property was not with the cestui que trust and when there was no understanding with him or previous consent given. It may be remarked here that in Davon vs. Fanning, Judge Kent does not lay down the rule that the trustee may not buy in any case. He only recognizes the general rule "that a trustee to sell cannot himself purchase." In the case before us the relation of the appellant to the property was rather that of a dry trustee, or one who merely holds the title, than that of one with power to sell. By the trust deed he had no power to dispose of the property. On the contrary, it was to be returned after a time to the appellee. All the trustee's power was to hold the legal title and receive the rents and profits and apply them. There

is no question that one having the title only may buy. Hi on trusts 537. The leading cases in which sales have bee made directly from the cestui que trust to the trustee, a those of Fox vs. McReth, 2 Bro. Ch. R. 400, Davison v Gardner, Sug. Vend. 436. Coles vs. Trecothick 9 Ves. 23 Monroe vs. Allain 2 Caine's Cas. in error 183. In Fox v McReth the sale was not sustained. It appeared that M Reth had obtained information, to what extent was not pr cisely known, from an agent sent by him at the expense the cestui que trust, to value the estate. Soon after an while trustee, he bought it from Fox for £39,000 and shor ly after sold it for £50,000. In Davison vs. Gardner, t sale was sustained by Lord Hardwick because it was fa and for full value. In Monroe vs. Allain, the execut with power to sell, purchased from the widow who was a so devisee and executrix. Circumstances were relied on t show that neither she nor her friends were acquainted wit the nature or extent of the rights she undertook to conve and the sale was set aside. In Coles vs. Trecothick, Lor Eldon sustained the sale, though for several thousan pounds less than the value of the property, and he obser ed "in this case you are not met by the danger that t trustee may buy with knowledge, acquired at the expen of the cestui que trust, that the value may be considerabl more than he is aware of." In that case it was appare that the cestui que trust had fully as much information his trustee. The difficulty in these cases was as to t question whether the trustee by being trustee, obtained i formation of the value of the property which gave him a advantage over his cestui que trust. When the court w satisfied that he had no such advantage, the sale was hel good.

If we take it then as proved that the property in the deed of 1845 was held in trust under the deed of 1844, and was sold by S. C. to E. C. Bellamy while the trust relation existed, do the facts and circumstances in the record bring the sale within the rule or make it an exception? To determine this, we should look at the knowledge of each of the parties of the value of the property as derived from their position towards it previous to, and at the time of the sale, and from its nature and situation. It appears from the record, that for several years before the sale, S. C. Bellamy had been in possession of the land, had cleared most of it and had made crops on it with the negroes,—that in 1841 he mortgaged both land and negroes to the Union Bank for 322 shares of stock, worth $32,200, and received a loan of two thirds of the amount of his stock, or $21,900, the interest on which, when the deed of 1845 was executed, was $5000. The appellee had thus owned the plantation and negroes for years—had been with them, had made crops with them and had encumbered them with mortgages, to do which, a valuation was necessary, who could have had better information of the value of his property than he? Who so familiar with the age, the health, the strength and capacity of each negro on his plantation as the owner? Who knows so well the quality of each acre of land? It appears that the appellant had made a crop with the negroes and land the year the deed was made, and we know of no other source of information he had as to their value. It is hardly possible he could have been so well informed on the subject as the appellee. It was said moreover in argument, that the consideration in the deed was so grossly inadequate as to be evidence of advantage taken by the trustee, that at the time of the sale the stock of the bank was much

below its nominal value, that the property could have been released from its encumbrances for much less than the amount of the mortgage and the money loaned on it, and that by keeping down the interest on the loan the property could easily have worked itself out of debt. We have no evidence to ascertain on what terms it may have been released from the bank. It appears that the bank was insolvent and consequently its stock and notes must have been below par, but I am aware of no rule by which courts are bound to know of the rise and fall of depreciated bank stock and paper, as they must know the date of a statute or on what day of the week a particular day of the month came on. The amount of stock due 20 years after was $32,000, of the loan, with the interest on it, $27,000, and the consideration of the deed $6000, making in all $65,000 as the amount to be paid off by the property taking the bank stock and loan at par. The value of the land and negroes at the time of the sale is uncertain from the record. Judge Baker, a witness, says land could not then be sold readily for cash at anything like its value, and negroes, though saleable, were low; other witnesses differ as to their estimates of the land. Taking though, at what I consider a liberal valuation, six dollars an acre for the land and $300 each on an average for the negroes, and the whole would have been worth $26,700. As to the argument that it was twenty years before the mortgage was due, and the payment of the loan could have been delayed by keeping down the interest, it must be remembered that suit was then brought for this loan which would soon become a judgment, and then the payment of the loan could no longer be stayed by paying the interest, but the appellee would have been at the mercy of th bank with its execution of $27,000. The best evidence w

have of the then value of this property is derived from Judge Carmack, a witness. He was the attorney of both parties in the transaction, was several days before the business was completed, consulting and advising with them, and his integrity and capacity are eulogized on both sides. His opinion was that six thousand dollars was a fair price for the land and negroes, taking in view the encumbrances on them. It should be observed that inadequacy is set up in the bill as one of the grounds of relief, and is denied by the answer, yet there seems to have been no effort to prove the fact. There could have been no great difficulty in finding out the value of these negroes and land in 1845, or what was the worth of the bank stock and paper. The inference is that the appellee was satisfied the inadequacy could not be proved. Inadequacy of price however is not sufficient alone to set aside a sale. Hill on Trustees, 537 and cases therein cited. White vs. Walker 5 Fla. R. 487. It should be observed moreover with regard to this sale that, whether the deed of 1844 was void between the parties or not, after it was declared so as to creditors, the parties so considered it.

In the evidence is a receipt by Samuel C. Bellamy to E. C. Bellamy for $1357 in part payment of the bridge contract. The proceeds of this contract were to have been applied under the trust deed in the payment of debts. Why should this money have been paid by E. C. Bellamy or received by his brother if they did not consider the relation between them under the deed as dissolved? The receipt of it was a virtual resognition by S. C. Bellamy that his brother was no longer bound to perform the covenants of the deed, but was obliged to return all he had obtained under it. They therefore considered themselves as standing

in the same position to each other as before the trust was conferred and dealing at arms length.

Looking then at all the facts and circumstances appearing on the record, I am led to the conclusion that the defendant could not have derived any information from his relation to the property, had it in fact been held by him in trust, which could have given him any advantage in a purchase from his cestui que trust, and that this sale would have come under an exception to the rule that the trustee shall not buy of his cestui que trust; that in the words of Lord Eldon, it is an instance where there was a clear and distinct contract that the cestui que trust intended the trustee should buy, and where there was no fraud, no concealment, no advantage taken by the trustee of information acquired by him as trustee.

Another ground assumed in the argument, of this cause, was that if the property conveyed in the deed of 1845 was not included in the deed of 1844, and was not bought by the appellant as trustee, still the record discloses the fact that a secret trust existed between the parties at the execution of the deed of 1845, and that therefore E. C. Bellamy should be held as trustee for that property and made to account for it.

Before considering the testimony on this point, I will advert to the character of the evidence which courts require when an instrument of writing is sought to be impeached by parol proof. The English rule is to allow such proof, only in cases of fraud, mistake or accident, and if relief should be prayed against an absolute deed on the ground that it was intended as a mortgage or trust, some writing would be required before the charge in the bill could be sustained. A leading case is that of Leman vs. Whitty,

1 Russ, 423. It was there clearly made out by parol evidence, that the deed absolute on its face, was in fact given without consideration, and solely for the purpose of enabling the grantee, who had better credit, to obtain money for the grantor. The bill prayed that the devisee of the grantee, who had by will the land conveyed in the deed, be declared a trustee for the grantor, but the court refused the evidence because not in writing. In Cripps vs. Jen., 1 Bro., Ch. R., 472, relief was granted, but a writing was produced in which the defendant acknowledged himself to be a trustee. In Irnham vs. Child, 1 Bro. Ch. R., 92, a defeasance was left out of the deed, on the idea that it would make the transaction usurious. The court refused parol evidence of an agreement that the property was to be redeemable. There is a diversity of opinion on the subject in the courts of this country, but the larger number of them, including the Supreme Court of the United States, and the Circuit Court of the United States for the First Circuit, allow the fact to be proved by parol evidence, that a deed absolute on its face, was intended as a mortgage or trust, and they hold that the admission of such evidence does not violate the Statute of frauds. It is perhaps unfortunate that our courts have departed from the English rule for the admission of such proofs; where the design of the parties was not to make the instrument defeasible on its face is certainly in contravention of the policy of the Statute of frauds and the general rule of evidence as to writings, which regard the instrument as the depository of all the intentions of the parties concerning the transaction, and are designed to prevent a resort to the "slippery memory of witnesses," and to withhold temptation to fraud and perjury among those who would gain by destroying

the deliberate work of their own hands. But the opinion seems to be in the courts of this country, that justice would be more often attained by allowing parol proof of a reservation outside of the writing, and by that opinion, sustained as it is by such numerous and high authorities, I am willing to be governed. But while assenting to it, I think the evidence to establish a meaning different from the face of the paper should be of the strongest character. The design is virtually to add another clause to the writing, the effect of which in many instances would be to strip the grantee of all the rights he has acquired when the paper is read without the proposed clause. The evidence should be as conclusive as that required to reform writings, on the ground of fraud, accident or mistake, for the end and effect in both cases is the same, that is, to break down entirely or impair the force of that which the law declares to be the best test of the deliberate and last intention of the parties in a transaction. Lord Hardwicke said that there must be the strongest proof possible. Lord Thurlow, that it must be strong, irrefragable proof, and that the difficulty of the proof was so great that there was no instance of its prevailing against a party insisting that there was no mistake. In Townshend vs. Strangroom, 6 Ves. 328, Lord Eldon observed that those producing evidence of mistake or surprise, either to rectify a deed or calling upon the court to refuse a specific performance, undertook a work of great difficulty. In Gilespie vs. Moore, 1 John. Ch. R., 597, Chancellor Kent says, the cases concur in the strictness and difficulty of the proof, and in Lyman vs. United Ins. Co., John. Ch. R., 364, where the bill prayed that a policy of insurance be amended, "no amendment was ever made without an

absolute conviction of the truth and precision of the real agreement." Judge Story says, "if the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract so as to make it conformable to the precise intent of the parties. But if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief upon the ground that the written paper ought to be taken as a full and correct expression of the intent, until the contrary is established beyond reasonable controversy."

There are certainly admissions and facts developed in the record which give rise to a very serious doubt whether it was the intention of the parties to stand towards each other in the relation of vendor and vendee. Samuel C. Bellamy was in the situation of most persons, who convey away their property by an instrument, which is intended on its face to create the impression with the world, that it is irrevocable, when there is a secret understanding, that it shall afterwards be annulled. He was deeply in debt and greatly harassed in mind. He had already made an effort to secure his unencumbered estate which had failed. Executions against him, greater than he could pay, were already in the hands of the Sheriff, and others to a large amount were hastening on. Unless some cover was found his future crops, as they were matured, would be seized and even his equity of redemption in the lands and negroes were in danger from these executions, for it was supposed that a bill then before the Legislature would be passed subjecting such equities to a sale at common law. Experience tells us, that it is the common recourse of men so embarrassed to devise secret trusts, that something may be saved from their ruined fortunes, and they naturally look to a brother or other near relative to aid them in their

trouble. In this dilemma, it appears he desired to make another deed of trust for an object similar to the first, and he proposed it to his brother. These circumstances certainly indicate his intention to save the property for himself. In connexion with them, may be taken the remark of E. C. Bellamy to Judge Baker after the trust deed was decided to be void, that he wanted something the lawyers could not break, and his further testimony that the object for which E. C. Bellamy and his brother were consulting with Judge Carmack, was avowed to be the security of E. C. Bellamy on his liabilities for Samuel. Also, E. C. Bellamy remarks to Stephens and Myrick, after the deed of 1845 was made, that he was doing the business for Sam's good—that he was aiding his brother who was not calculated to attend to his own business, and that the five negroes mentioned in the trust deed were bought by him at the sale in 1846 for his brother. These things go to show that he did not look on himself as the owner of the property. The admission, however, should be taken with much allowance, for they are, at best, a weak kind of evidence, and in most cases, can be explained only by him who makes them. If they had been stated in the bill as required by English practice, the appellant may have given them a version entirely inconsistent with the idea that he considered the property his brother's. To support the presumption of a trust are also the offers of the appellant to annul the deed on being indemnified for his payments and liabilities on account of his brother. All his statements though should be taken together. He says, in his answer, that the offers were made after S. C. Bellamy had threatened to do everything to injure him in purse and reputation, and even by taking

his life, and his object in extending them was peace, avowing however, at the same time, his full title to the property.

Further, it does not appear consonant with the ownership of the property that all the security debts in the obligation accompanying the deed, were contained in the trust deed of 1844, and that some of the debts paid after the deed of 1845 was made, were included in the trust deed and not in the obligation, also that after the execution of the deed of 1845, the appellant should have gone on and paid other claims than those for which he had rendered himself liable in the obligation and paid them to an amount greater than the consideration of the deed. The reason for all this is by no means clear. It may have been that he was acting under an arrangement with his brother subsequent to the execution of the deed, or that under the fear of an attack on the deed from the creditors of his brother, and apprehensive for it, of a fate similar to that of the trust deed, of which he had had such recent and unpleasant experience, he judged it safest to buy up the claims against his brother.—But there is surely great room to presume that his aim was to carry out the design of the deed of 1844, which provided for the payment of all the debts.

Again, it may be asked why did S. C. Bellamy thus convey from himself every vestige of his property? What profit was there in stripping himself of every thing?—Ordinarily in cases of this kind, the expectation is to save something in the end, and if there is no hope of this, the owner is indifferent upon what shore the wreck of his estate may be cast, or who will profit by its fragments. It may be considered in this instance as a motive for an absolute sale, additional to that usually prevailing in such misfortunes, that the appellant, a brother, was liable as

well as others, who he says without pecuniary consideration, and as an act of friendship and kindness to himself, were implicated for him as securities and endorsers; that he had nothing left but this equity of redemption, and this might also be levied on and sold. Under these circumstances it may be, urged by a generous impulse to save those for whom he felt a deep gratitude in preference to all others, his brother refusing to have anything more to do with trusts he resolved to make a sale, and save his friends, if he could not save himself. It may have been also without a word said on the subject, that he had a secret hope and belief, his brother, if he succeeded with his property, would restore it to him.

Taking all these circumstances together, there is certainly much to induce the suspicion that an understanding existed between the parties, that the ownership of the property should still be in S. C. Bellamy. It might be remembered though, that in opposition to this suspicion are the absolute deed and the sworn answer of the appellant. He positively denies that there was any connection between the two deeds, and avers that the last was a *bona fide,* absolute conveyance, free from any secret trust, and Judge Carmack testifies that there was no connection between the deeds, that both parties protested there should be no secret agreement or understanding, and that the deed was undoubtedly intended by them as an absolute and unqualified conveyance. It should be noticed that in all appellant's conversations, he never says that he was the trustee, or mortgagor, or agent of his brother. He avows that his object in the purchase was to secure himself, and that he afterwards offered to annul the deed if fully indemnified; but he nowhere admits that he did not have

the full title to the property and avers the contrary. There is not a word of direct proof in the record, either of a written or verbal understanding of the parties, that there should be a condition to the deed. If it did exist, we can find it out alone by the circumstances that transpired after the deed was made, and which have just been referred to. The cases of Morris vs. Nixon, 1 How. R., 118, and Jenkins vs. Eldridge, 3 Story R., 181, were cited to show a similarity between the evidence on which relief was granted in those cases, and the facts in this. In Morris vs. Nixon, the plaintiff applied to the defendant for a loan.—The design of a loan was established beyond doubt by a letter of the defendant and by the testimony of witnesses who assisted in the negotiation as to matters which occurred before the affair was completed. The *mode* adopted to secure the loan was by an absolute deed of the land, and a bond for the repayment of the money borrowed. The proofs that the deed was intended as a security for the loan were perfectly satisfactory. In Jenkins vs. Eldridge, it was alleged in the bill that there was a distinct understanding before the deed was made, that the land should be reconveyed, after indemnification to Eldridge for his payment, in behalf of Jenkins and a suitable compensation for his services about the property. This allegation was fully sustained by the evidence of the counsel of Jenkins in the transaction, and other witnesses. One of them testified that it was agreed no bond should be given by Eldridge, but that he should make a declaration or memorandum of trust, which he was to keep among his papers, and afterwards on being questioned, Eldridge replied, that he had no objection to making such declaration and would do so immediately. Another witness stated that Eldridge

had often said to him that he held the estate in trust for the benefit of Jenkins, that he had often spoken of it in terms as Jenkins' property, and that he was merely acting as an agent and meant to be well paid for his services. In the case before us there is no evidence whatever of a previous agreement to hold the property in trust.—Judge Carmack tells us that both parties declared there should be no such agreement, and the defendant avers in his answer, that he bought the property absolutely. There is no evidence of acknowledgment in terms, in conversations between the parties or between the appellee and others of such an understanding, or that E. C. Bellamy ever admitted he was acting as a trustee or agent. There may have been a hope or expectation in the breast of S. C. Bellamy, that his brother would restore the property, but that hope or expectation alone was not sufficient to make this a trust deed. There must have been not only the intention on his part to make it a trust, but such must have been the design and understanding of E. C. Bellamy.—Where is the clear and satisfactory evidence to convince the mind that there was such an understanding by him? I must confess I have not been able to find it on the record. There is reason for conjecture and suspicion, a strong suspicion, I admit, but it is not fully proved. If we take it as proved that S. C. Bellamy designed a trust, but it is not clear that E. C. Bellamy designed it, how could a court give relief against the face of this deed which it is the policy of the law to regard as the best test of the deliberate and last intentions of the parties? If a court were to order a reform of the deed to meet the intention at the time of its execution, what would be the defeasance according to the proofs in this record? If a mortgage,

should then a provision for a foreclosure and sale, and if for a sale, after what time should it be made and for what amount should it be a security? If a trust, for what purpose? Should the appellant be compelled to pay the debts mentioned in the obligation or all the debts of his brother as provided for by the trust deed? In Morris vs. Nixon and Jenkins vs. Eldridge, there was no difficulty from the evidence had a reform of the deeds been prayed to have changed the one to a mortgage and the other to a trust. It is not the province of a court to make writings for parties such as they probably designed, but to aid them in carrying out their intent where there is no doubt as to what they meant. If the proofs are doubtful, then in the words of Judge Story, "equity should withhold relief upon the ground that the written paper is to be taken as a full and correct expression of the intent, until the contrary is established beyond reasonable controversy.

It may be that in holding this deed to be absolute, the design of the parties would not be effected, and right and justice might not be administered according to the true state of the facts, existing at the time the deed was made; but if so, however, much we might regret it, this would be but one among a multitude of instances where justice could not be done by a court, because of the insufficiency of the proofs. Courts of equity are governed by the same rules of evidence as courts of law, and though they have power beyond courts of law, to meet and relieve the hardships of particular cases, yet it is not one of their greater remedial powers to relax the rules of evidence, and before they can extend a remedy the truth must be proved by the same stern and exacting rules as required by a court of law.

Those rules were created from considerations of high public policy; a strict, inflexible adherence to them will more often achieve and sustain the right than secure injustice in its unlawful gains. It is better to suffer the wrong to triumph in one instance, than by breaking through these safeguards of truth, afford a precedent that will hazard the rights of many in subsequent suits of a like nature by opening an avenue to fraud and perjury.

Upon the whole, I am not satisfied that there was an understanding of the parties that the property should be held in trust. I think that to grant the prayer of this bill, would be to infringe the statute of frauds, and the general rule prohibiting parol evidence, when a contract is in writing, and would be affording relief in a case where in the language of Judge Kent, "an amendment would be made without an absolute conviction of the truth and precision of the real agreement." Entertaining these views, I am of opinion that the bill ought to be dismissed, except for the purpose of taking an account of the property specified in the trust deed of 1844, and its profits and issues.

HENRY ALLEN, APPELLANT, VS. NELSON HAWLEY, APPELLEE.

1. As a general rule, the several owners of a merchant vessel or steamboat, hold their respective interests therein, as *tenants in common* and not as *co-partners*, and consequently are to be governed by the rules of law, applicable

to that species of tenure. But to this rule there may be *exceptions*, either growing out of the express agreement of the parties,or to be implied from the nature and character of the business or adventure in which they may be engaged.

2. Where partnership funds are invested in the purchase of a steamboat, in the absence of any positive stipulations between the part owners to the contrary, they will hold their respective interests in *strict partnership* and the property will be subject to the law of partnership. The case of "Loubat vs. Nourse" (5 Florida Rep. 350,) referred to and approved.

3. An injunction will be granted upon *motion and without notice*, whenever the giving of the notice would probably accelerate the injury complained of in the bill of complaint. The peremptory requisition for the giving of notice provided for in the statute regulating,chancery proceedings, is limited and restricted to application *"to stay proceedings at law."*

4. Whenever the intervention of a Court of Equity becomes necessary in consequence of dissentions or disagreements between the copartners, to effect a settlement or closing of the partnership concerns,upon bill filed by any of the partners,showing either a *breach of duty* on the part of the other partners or a *violation of the agreement* of partnership a Receiver will be appointed as a matter of course.

5. A court of equity has no authority to appoint a receiver,with a view permanently to carry on the business of a partnership, but there is no impropriety in directing the Receiver to superintend the business, during the pendency of the legal proceedings instituted for the purpose of dissolving the partnership.

6. If a receiver either exceed or abuse his authority, as defined by the terms of the order making the appointment, and injury or damage thereby result to any of the parties in interest,, they have their remedy on his bond. But such transcending or abusing of his authority, cannot, on appeal,be urged against the validity of the order.

7. In all cases of a partnership at will, whether the contract was originally of that nature,or has become so by effluxion of time, or from other circumstances, a Court of Equity will, upon a dissolution, decree a sale of the entirety of the partnership effects, at the desire of any of the parties.

8. When the answer fully denies all the circumstances upon which the Equity of the bill is founded, it is the usual practice to dissolve the injunction. But there is no *inflexible* rule to this effect for the granting or continuing of the

injunction, must always rest in the sound discretion of the court, to be governed by the nature of the case.

9. Each of the copartners has a *specific lien* on the partnership stock, not only for the amount of his share, but for monies advanced by him beyond that amount for the use of the copartnership, and the share of each, is the proportion of the residue, on the balance of account.

Appeal from Franklin Circuit Court, sitting in Chancery.

Nelson Hawley filed his bill in the court below, alleging that he and Henry Allen having contracted with the Government of the United States for the transportation of the mail between Apalachicola and Chattahoochee for four years, from the first of July, 1847, entered into articles of agreement for the purchase of a steamboat to be used as well in said service as in the transportation of freight and passengers, of which agreement, the following is a copy, viz:

STATE OF FLORIDA,
COUNTY OF FRANKLIN,

This agreement made and entered into between Henry Allen of the State aforesaid, and Nelson Hawley, of the aforesaid State and county of Gadsden, witnesseth, that the said Henry Allen and Nelson Hawley, being jointly interested in a contract with the United States, for carrying the mail for four years, commencing on the first day of July next, upon the Apalachicola river, between the city of Apalachicola and Chattahoochee on said river, known as route No. 3523, all in the aforesaid State; and in order to carry out the aforesaid contract, do agree that the said Henry Allen, on his part, is to furnish in cash the sum of three thousand dollars, and the said Nelson Hawley, on his part, is to furnish the like sum of three thousand dollars; and it is further understood and agreed, that the said money, say

six thousand dollars, to be paid into the hands of the said Henry Allen, and he is to proceed at once to New Orleans, and if necessary, up the Mississippi and Ohio rivers, for the purpose of purchasing a suitable steamboat, to carry out the conditions of the said mail contract, using his judgment and means to the best advantage in making a selection and purchase of said boat; and if found upon examination, to be for the benefit of the parties interested to pay more than six thousand dollars for the said boat, he, the said Allen, shall be authorized to give a joint note for the balance required, or secure the parties by lien upon the boat, as may be most expedient. All necessary expenses occurring in purchasing said boat, to be shared equally by both the above mentioned parties. And it is understood and agreed, that Allen is to have command of said boat or boats, at a reasonable salary, say one hundred dollars per month, and to give his undivided attention to the interest of the contractors. And it is further agreed that Daniel Fry is to be employed in the capacity of engineer to furnish his own second at a salary of one hundred and thirty-five dollars per month, as long as he faithfully discharges the duties in the above capacity, to the satisfaction of the master of the boat. In witness whereof &c., &c."

Dated 8th May, 1847.

The Complainant, Hawley, also alleged in his bill that he had advanced and paid to said Henry Allen the sum of Three thousand dollars, provided to be paid by said articles of agreement,—that Allen did purchase a boat, called the "Quincy," costing fourteen thousand six hundred and fifty dollars, with which he had been engaged in the mail service as mentioned in the agreement and in the business of

transporting freight and passengers, having the entire control and management thereof and of the funds. That shortly after the arrival of the boat he applied to said Allen for a bill of sale and to be recognised as joint owner and for an account all of which was refused, and was compelled to incur considerable expense and trouble to institute proceedings at law to obtain a bill of sale and his rights. That during the service of said boat, she made a large sum of money, out of which, complainant claimed he was entitled to his portion.

The complainant further alleges that the four years of the mail contract for which said boat was bought, having elapsed, he made application to said Allen for a settlement and adjustment of the affairs of said boat and for its disposal by sale or otherwise, and that he proposed, as a means of attaining that end, either to sell or buy; that pending this proposition he perceived that the boat was firing up as if ready for departure and that he immediately went on board and protested against her being taken out of the waters of the State, but that said Allen disregarding his wishes and in defiance of his rights proceeded with the said boat to the County of Decatur, in Georgia, where he left her and proceeded himself to the North; that said boat remained in said county until he, complainant, on being informed that a seizure of said boat was made by process of law in Georgia and that a sale was about to be had, was compelled out of regard to his own interests, to advance his own means and take up the fi. fa. against said boat, to save her from sacrifice.

The bill concludes with a prayer for an account, &c., for a dissolution of the joint interest and sale of the boat, for a Receiver with power to make repairs with reference

to a sale, and for an injunction restraining said Allen from further interfering with said boat or its proceeds, or from collecting any debts, &c., due the same, or from selling or otherwise disposing of his interest therein.

The complainant filed as part of his proofs a copy of the execution issued in Georgia, which had been levied on said boat and taken up by himself.

The court below, on motion of complainant granted an order, directing a writ of injunction to issue as prayed for in the bill, and also appointing Archibald T. Bennett Receiver, "to take charge of the steamer Quincy, to prevent injuries from waste and decay, and other casualties as far as may be practicable; to repair the said boat so as to put her in condition for sale, or such disposition of her as may be ordered by the parties, or the court may order, the expense of repair and the like to be repaid by proper use of the said boat.

Henry Allen subsequently filed his answer, in which he admitted the articles of agreement above recited, and also that complainant Hawley, had paid him the sum of three thousand dollars, as provided therein, which he applied in the purchase of said boat. The defendant alleged that the greater part of the difference between the cost of said boat and the cash contributed by the parties, was paid by his drafts and notes. He admitted that he took a title to said boat in his own name, and that he refused to give to Hawley a bill of sale for one half thereof, but alleged that he felt justified in so doing, from the fact that he had given his note and drafts for a large sum for the balance due on said boat, and until the same was paid, he was unwilling to give complainant a title to said boat; that all the matters in dispute between complainant and defendant

were, after the filing of a bill by complainant for an adjustment of them, settled by arbitrators to whom they had been referred, and that in pursuance of their award he executed a bill of sale to complainant for one half of said boat. He further says in his answer, that he did take the boat to Decatur County, Georgia, but not in the manner or with the intent alleged in the bill, but that he took her there and laid her up, the business season being over, because it was a safe place for that purpose, and refers to the destruction which befel such boats as were kept at Apalachicola in the summer of 1851, as an evidence of his having done right in not allowing complainant to guide him in the matter. He alleged that complainant was guilty of a wrong when he went to Decatur County and by violence took possession of said boat, as he was informed and believes he did, with the view to harass him with vexatious suits, &c.; that the pretence that complainant was forced to go to Decatur County to prevent a sale of the boat, was without foundation, for that the writ of fi. fa., levied thereon was issued wrongfully, and that so far from there being danger of a sale under said writ, the agents of defendant would have protected the boat from sale, and that had any sale been made, it could only have been of his, defendant's interest. He further alleged that as to the charge that he refused to sell his interest or buy that of the complainant in the boat, he well knew the improbability that he could in any negotiation with complainant of purchase or sale escape without loss, and therefore declined entering into any such treaty and refuse so to do. Defendant further alleged that he refused to give his assent to making any repairs which complainant desired to make on said boat, because he considered the hull of said

boat to be in such a condition as to make it impossible to repair said boat at any rate that would justify his doing so, and he gave notice to complainant that he would not be answerable for any repairs and would not consent to the same, and he insisted that complainant in procuring the order to have repairs made without notice to him, and by procuring the repairs, acted in such a manner as should render him, complainant, alone responsible for the same, &c.; that his, defendant's share of the boat would be swallowed up in paying for repairs, should a sale of said boat be made for the purpose. The answer denied the charge in the bill, that he had refused to render an account or to permit the complainant to examine the books, &c., and it also in terms, denied all the equities set up in the bill, &c.

Afterwards complainant petitioned for a sale of the boat, on the ground that she was running at great disadvantage for want of new shafts, &c., and because she could be run to much greater advantage by some person who had the ownership and full power and control over her, than by the Receiver, under the authority of the court.

The prayer of this petition was granted and a sale of the boat was ordered by the court, the funds to be retained, &c.

Another order was afterward granted, directing a distribution of the proceeds of the sale of the boat, amounting to $4000, to be made, by which the Receiver was required to retain $713, (claimed by an alleged creditor, but contested by the parties) until further advice, and to pay the sum of $3342.88, to parties named therein.

The defendant, Allen, feeling himself aggrieved, appealed from the orders granted, viz: the order granting an injunction; the order appointing a Receiver; the order of

sale of boat Quincy; the order refusing to dissolve injunction and vacate the order appointing Receiver, and the order for the distribution of the fund arising from the sale of said steamboat.

W. G. M. Davis and T. J. Eppes, for Appellant.

G. S. Hawkins, for Appellee.

DUPONT, J., delivered the opinion of the court.

The first point that arises in this cause and upon the decision of which mainly depend many of the positions of law, assumed by the Counsel of the appellant, involves the inquiry as to the character of the tenure, by which several individuals may hold title to merchant ships or steamboats. In other words the relation which the several individuals hold to each other, in respect to the ownership of that particular species of property.

All writers upon the subject of commercial and maritime law concur that, as a general rule, merchant vessels employed in navigating the ocean (and we have discovered no exception in respect to steamboats plying on the waters of the interior rivers and lakes,) are held in tenancy in common, and not in joint tenancy, and there by withdrawing that particular species of property from the operation of the law of *"Partnership."* In confirmation of this being the general rule on the subject, it is laid down in the books that "a ship is a chattel of which the owners are possessed as tenants-in-common ; though if it be conveyed to them at one and the same time, and by one instrument, they are more properly joint tenants, without benefit of survivorship." (Coll. on Part., Sec., 1185, Perkins Ed.)

Judge Story in his treatise on the law of partnership, (sec.417,) concurs in the doctrine thus: "Property in a ship

(says this author,) may be acquired by two or more persons, either by building it at their own expense, or by the purchase of a part thereof of the sole owner or by the joint purchase of the whole, of another person, but whether acquired by a joint building, or a part purchase, or by a joint purchase, the parties, in the absence of all positive stipulations to the contrary, because entitled thereto as tenants-in-common and not as joint tenants. In this respect it will make no difference whether the title is acquired at one and the same time, by and under one and the same instrument, or whether it is acquired at different times and under different instruments." And to the same effect are all the adjudications, both in England and in this country. Dodington vs. Haller, 1 Vesey, 497—Ex parte, Young, 2 Ves. and Beam., 242; Nicoll vs. Munford, 4 John. Ch. Rep., 522. Munford vs. Nicoll, 20 John, R., 611.

This however is to be taken as the enunciation of a general rule, and not as a *universal* principle, and like all general rules subject to exceptions. In this the authorities all agree. Collier in announcing the rule, limits it thus: "But a ship as well as other chattels, may be held in strict partnership, with all the control in each partner incident to commercial partnership." Coll. on Part., Sec. 1186, Perk. Ed.

Judge Story qualifies the doctrine by stating it to be so "in the absence of all positive stipulations to the contrary," (Story on Part., Sec. 417) and thereby tacitly admits that the general rule may be modified by the contract or agreement of the parties. Chancellor Kent also recognizes the exception, and with his usual clearness, has stated the distinction between part ownership and

partnership in this species of property. He says, "the cases recognize the clear and settled distinction between part owners and partners. Partnership is but a tenancy in common, and a person who has only a part interest in a ship is generally a part owner, and not a joint tenant or partner. As part owner he has only a disposing power over his own interest in the ship, and he can convey no greater title, but there may be a partnership as well as cotenancy in a vessel; and in that case one part owner, in the character of partner, may sell the whole vessel, and he has such an implied authority over the whole partnership effects as we have already seen. The vendee in a case free from fraud, will have an indefeasable title to the whole ship. When a person is to be considered as a part owner or as a partner in a ship, *depends upon circumstances.*"—(3 Kent's Com., Sec. 45, p. 154, 4th Ed.)

In Harding vs. Foxcroft, 6 Greenl. R., 77, Mellen, Chief Justice said, "there may be a partnership as well as a cotenancy in a vessel. When a person is to be considered as a part owner and when as a partner in a ship, depends on circumstances. The former is the general relation between ship owners, and the latter the exception, and it is required to be shown specially." In Philips vs. Purvington, (15 Maine, 427), Shepley, J., remarks, "it is contended that they were not partners but tenants in common of the vessel. Such is the usual relations of part owners, but they may become partners." In the case of Lamb et al., vs. Durant, 12 Mass. R., 60, Parker, C. J., says, "vessels owned by a copartnership are certainly effects of the partnership and not unfrequently the principal effects. Occasion for selling them frequently arise in the course of business, and notwithstanding they are common-

ly conveyed by an instrument under seal, they may pass by delivery only, as well as any other chattel, so far as respects the property of the vessel. No exception from the authority of the partner relative to partnership effects, can be found in favor of vessels; and there seems to be no reasons for such exceptions."

Upon the authority of the decision, in the case of ex parte Young, 2 Vesey and Beam., 242, which was decided by Lord Eldon, and the effect of which decision according to Mr. Collier, was to overrule Lord Hardwicke's opinion in the case of Dodington vs. Hallet, 1 Vesey, 497. Chancellor Kent decided the case of Nicoll vs. Munford. In delivering his opinion in that case he says, in allusion to the decision of Lord Hardwicke, "I dare not therefore follow a case which has never had effect, and has been so authoritatively exploded. The cases which have been referred to, are in point against the allowance of any partnership claim, or taking an account on the foot of any partnership in the vessel."

With all proper deference and respect for the opinions of Mr. Collier and Chancellor Kent, the former of whom asserts that the decision of Lord Hardwicke had been "*expressly over-ruled,*" and the latter that it had been *"authoritatively exploded,"* we are inclined to think that the language used in respect to the effect of that decision, is too strong. The language adopted by Lord Eldon in delivering his opinion in the case of ex parte Young, seems to us expressly to decline to over-rule the case of Dodington vs. Hallet, for he says, "the difficulty in this case arises upon the decision of Dodington vs. Hallet by Lord Hardwicke, which is directly in point. That case is questioned by Mr. Abbot, who doubts what would be done with it at this day,

and I adopt that doubt. The case which is given by Mr. Abbot from the Register's Book is a clear decision by Lord Hardwicke that part owners of ships being tenants in common, and joint tenants, have a right notwithstanding to consider that as a chattel used in partnership and liable as partnership effects to pay all debts whatever to which any of them are liable on account of the ship. His opinion went the length that tenants in common had a right to make a sale. There is great difficulty upon that case and the inclination of my judgment is against it, *but it would be a very strong act for me by an order in bankruptcy, from which there is no appeal, to reverse a decree made by Lord Hardwicke in a cause.* From a manuscript, I know that it was his most solemn and deliberate opinion after great consideration, that the contrary could not be maintained, *and there is no decision in equity contradicting* that." In the note of Lord Eldon's judgment in ex parte Harrison (2 Rose R., 78 note,) the language attributed to him is, "I certainly differ from Lord Hardwicke, but I hesitate to decide against his deliberate judgment in a cause, upon a petition in Bankruptcy."

But whatever may be the effect to be given to Lord Eldon's opinion, it is very certain that Chancellor Kent, who based his decree in the case of Nicoll vs. Munford, upon that opinion was reversed upon a review of that case in the Court of Errors of New York, Munford vs. Nicoll, 20 John R., 611.

It is not at all improbable that the apparent difference which seems to exist between Lord Hardwicke and Lord Eldon on this subject, has grown out of a misapprehension of the extent to which the former intended to be understood as having gone, in his decision of the case of Dodington vs. Hallet ;

hat case might very well from its circumstances have been decided as it was, without in the least trenching upon the doctrince which recognizes the distinction between the rights of tenants in common and copartners. Spencer, C. J., in Munford vs. Nicoll, says Lord Hardwicke, perfectly understood the distinction between a tenancy in common, such as owners of different shares in a ship have among themselves, and a joint tenancy, as between partners of the goods and stocks in trade. He meant to decide, and did decide, that a subject which ordinarily may be held as a tenancy in common, may by the acts of the parties become to be held in joint tenancy, and the fact of the agreement to build the ship at their joint expense, in proportion to their shares, and the agreement to fit her out, manage and victual her for the service of the East India Company, formed in his judgment, such a community of interest, as to constitute that a partnership transaction in relation to those subjects, and thus a *specific lien* was acquired, &c. In the course of his opinion, Chief Justice Spencer further remarks: "I must not be supposed to overrule the distinction between partners in goods and merchandise, and part-owners of a ship. But I mean to say that part owners of a ship may, under the facts and circumstances of this case, become partners as regards the proceeds of the ship ; and if they are to be so regarded, the right of one to retain the proceeds until he is paid what he has advanced beyond his proportion, is unquestionable.

The result of our investigations is that as a *general rule,* the several owners of a merchant vessel or steamboat, hold their respective interests as tenants in common, and not as copartners, and consequently are to be governed by the rules of law applicable to that species of tenure; but

that, to this rule, there may be exceptions, either growing out of the express agreement of the partners, or to be implied from the nature and character of the business or adventure, in which they be about to engage.

Applying the principle to the present case, and we are very clear in the opinion that the appellant and appellee as part owners of the Steamboat Quincy, held their respective shares in the same, not as tenants in common, but as copartners.

There is no evidence in the record of an *express agreement* between the parties that their respective interests in the boat was to be held in strict partnership, but originating as these interests did out of a copartnership business and being subservient thereto by the express terms of the agreement entered into between them in reference to that business, we do not see how it can be looked upon as an interest outside that partnership. For a correct understanding of our views on this point we give the written agreement alluded to, *in haec verba,* which may be found in the record, and noted as "exhibit A:"—

STATE OF FLORIDA, }
COUNTY OF FRANKLIN. }

This agreement made and entered into between Henry Allen of the State aforesaid, and Nelson Hawley, of the aforesaid State and County of Gadsden, witnesseth, that the said Henry Allen and Nelson Hawley, being jointly interested in a contract with the United States, for carrying the mail for four years, commencing on the first day of July next, upon the Apalachicola River, between the city of Apalachicola and Chattahoochee on said river, known as route No. 3523, all in the aforesaid State; and in order to carry out the aforesaid contract, do agree that the said Henry

Allen, on his part, is to furnish in cash the sum of three thousand dollars, and the said Nelson Hawley, on his part, is to furnish the like sum of three thousand dollars; and it is further understood and agreed, that the said money, say six thousand dollars, is to be paid into the hands of the said Henry Allen, and he is to proceed at once to New Orleans and if necessary, up the Mississippi and Ohio rivers, for the purpose of purchasing a suitable steamboat, to carry out the conditions of the said mail contract, using his judgment and means to the best advantage in making a selection and purchase of said boat; and if found upon examination, to be for the benefit of the parties interested to pay more than six thousand dollars for the said boat, he, the said Allen, shall be authorized to give a joint note for the balance required, or secure the parties by lien upon the boat, as may be most expedient. All necessary expenses occurring in purchasing said boat, to be shared equally by both the above mentioned parties. And it is understood and agreed, that Allen is to have command of said boat or boats at a reasonable salary, say one hundred dollars per month, and to give his undivided attention to the interest of the contractors. And it is further agreed that Daniel Fry is to be employed in the capacity of engineer to furnish his own second at a salary of one hundred and thirty-five dollars per month, as long as he faithfully discharges the duties in the above capacity, to the satisfaction of the master of the boat. In witness whereof, &c., &c."

It will be perceived by reference to this paper that the parties had become "jointly interested in a contract with the United States for carrying the mail for four years" upon a certain mail route, and they mutually agree to furnish, each a certain amount of cash, for the purpose of purchas-

ing a suitable steamboat "to carry out the conditions of the said mail contract." It is also evident from the terms of the recital in the written agreement that they were co-partners in the strictest sense of the term, so far as the contract for carrying the mail was concerned, and we find it impossible upon any sound principle, to view the Steamboat to be purchased in any other light than as an *instrument* to carry out that contract, and a part of the stock in trade. The mail contract was the *subject*, the Steamboat the mere incident, and therefore subservient thereto.

But should we be in error on this point, there is one other view of the subject, that to our minds is unanswerable. It will be remembered that the *cash* contributed by the two parties, in equal portions, amounted to the sum of only six thousand dollars, and that the entire cost of the boat was about fifteen thousand dollars.

The excess of cost, as is made to appear by the record, was secured by a lien on the boat, (in virtue of one of the stipulations of the contract) and that the same was eventually paid off and discharged *from the net earnings of the boat.* Now, in none of the authorities cited for the appellant, is it for a moment doubted that although the vessel itself may be under the operation of the strict technicalities of a tenancy in common, yet that the proceeds of the cargo or adventure, is subject to the law of partnership.—If this be so, then the case before us is one in which *partnership funds* have been invested in the purchase of a certain species of property ; and it is only necessary to refer to the books to see the effect and operation of such a transaction. The discussions which have occurred in respect to the different rules which obtain in the respective cases of partnership and tenancy in-common, have grown out of the

conflicting interests involved in the administration of *real estate*, which had been purchased with the funds of the partnership. This subject was very ably discussed by Thompson J., in the luminous opinion which he delivered in the case of Loubat vs. Nourse, 5 Fla. R. 350, which was decided by the court, at its term held in Marianna in 1853; and the conclusion at which the court arrived, after an elaborate and critical examination of the authorities both in this Country and England was, that "although such an estate be conveyed to the partners, so as to *vest in them a legal estate as tenants in-common*, yet in the absence of an express agreement, or circumstances showing an intent that the estate is to be held for the separate use of the partners, it will be considered in equity as vesting in the partners, in their partnership capacity, subject to an implied trust that they shall hold it until the purpose for which it was purchased have been accomplished, and that it shall be applied, if necessary, to the payment of the partnership debts." This is an authoritative exposition of the law as it at present stands in this State; and if it be the law governing *real estate*, we can perceive no sound reason why it should not, with greater force, be applicable to every other species of property. The counsel for the appellant, in the supplemental brief furnished to the court, relied further upon the fact, that the complainant, Hawley, in his bill alleges that he had previously been compelled to resort to a Court of Equity to compel Allen to make him a title to his share in the boat, and deduces therefrom the conclusion that the interests of the respective parties had thereby been severed. It is a sufficient reply to this argument to refer to the opinion in the case of Loubat vs. Nourse, just cited, in which it is laid down that "although such estate be con-

veyed to the partners, so as to vest in them a legal estate as tenants in-common, yet in the absence of an express agreement, or circumstances showing an intent that the estate is to be held for the separate use of the partners, it will be considered in equity as vesting in the partners," &c.

The case of Fry vs. Hawley, 4 Fla. R., 258, has also been referred to as an authoritative adjudication of the point now under discussion. We have looked very carefully into that case, and think that the counsel has misapprehended the extent of that decision. The point now under consideration did not arise, even incidentally, and it was therefore unnecessary that it should have been decided; nor do we find in the opinion, even a *dictum,* which would support the assumption of the counsel. In that case the court only decided that the transaction between Hawley and Fry, did not raise a partnership between the three Allen, Hawley and Fry, (there being no privity between, Hawley and Fry,) and left the question as to the *relation* existing between Allen and Hawley, growing out of the terms of the contract for carrying the mail, and the circumstances connected with the building of the boat, wholly untouched.

Having thus determined that the steamboat Quincy, is to be considered as partnership property, and as such property, within the jurisdiction of the Court of Chancery, it now only remains for us to determine upon the propriety of the several interlocutory orders which have been entered in the progress of the suit now pending between the parties; and which (under the provision of the statute) have been appealed from by the defendant below.

The first order mentioned in the petition of appeal, is the "order granting an injunction."

The bill of complaint filed in this cause purports to be by one partner against his copartner, and contains the usual prayer for account of the profits of the boat, and that she be sold, which is accompanied by the further prayer for the appointment of a receiver and for the issuing of a writ of injunction, "to restrain the said Allen from further possession or interference with said boat, or its proceeds, or from collecting any debts, dues or demands due the same, or from selling or disposing of his said part of said boat." The bill appears to have been filed on the 10th day of September, 1851, and the writ of injunction, in accordance with the prayer, granted on the same day, but not executed until the 11th day of February, 1852.

In Adams Eq., 641, (margin 37) the law regulating the granting of an interlocutory injunction is thus stated :— "The grants of the interlocutory injunction indiscretionary with the court, and depends on the circumstances of each case and on the degree in which the defendant or plaintiff would respectively be prejudiced by the grant or refusal." And again at page 639, (margin 335,) an injunction is granted to restrain a defendant, so long as the litigation continues, from doing acts productive of permanent injury, or from proceeding in an action at law, where an equity is alleged against his legal right. On the same page the author further remarks: "The ordinary mode of obtaining this injunction, is by moving after notice to the defendant; but in particular cases where giving notice might accelerate the mischief, it will be granted ex parte, and without notice. *e. g.* in cases of waste, or of negotiating a bill of exchange; and even where that special ground does

not exist, yet if the act to be prohibited is such that delay is productive of serious damage, as in piracies of copyright and patent, an ex parte injunction may be obtained." Our statute provides that no writ of injunction or *ne exeat* shall be granted until a bill be filed praying for such writ, except in the special cases, and for the special causes in which such writs are authorized by the practice of the courts of the United States exercising equity jurisdiction; and no writ of injunction to stay proceedings at law, shall issue, except on motion to the court or Judge, and reasonable notice of such motion, previously served on the opposite party or his attorney, &c.

The injunction in this case was granted on motion, and it does not appear that any notice of the application was given to the opposite party; and we think that the circumstances sworn to in the bill, made it just one of those cases contemplated by the law, in which the notice might be dispensed with, viz: where the very giving of the notice might in all probability *"accelerate the injury."*

It will be further noted that the peremptory requisition contained in the statute above cited, is limited to applications *"to stay proceedings at law,"* and in all other cases we presume, that the practice of the High Court of Chancery of England will prevail, where it does not conflict with the rules of court.

Upon an examination of the record, (for we had no argument from the counsel on this matter of the appeal,) we do not find any error in the order granting the injunction, and do therefore affirm the same.

The second ground of appeal is from "the order appointing the Receiver."

The law in regard to the appointment of a Receiver, in

suits between copartners, is laid down thus by Adams in his work on equity: "The first step is, that the partnership debts should be ascertained, and the assets applied in their discharge. If the parties cannot agree on the intermediate management, whilst the process of dissolution is going on, a receiver may be appointed to conduct it.—But the court cannot permanently carry on the business, and will not therefore appoint a receiver, except with a view to getting in the effects, and finally winding up the concern." Adams Eq., 437. [margin 243.]

Collier says: "where a dissolution is intended, or has already taken place, a Court of Equity will appoint a receiver, provided there be some breach of the duty of a partner, or of the *contract* of partnership." (Collier on Part., Perkins Ed. 354.)

In New York, it is a matter of course to appoint a receiver, if the parties cannot agree among themselves, as to the disposition and control of the property, upon a bill filed by one of the partners, to close up the partnership concern. Martin vs. Van Sharick, 4 Paige 479, Innes vs. Lansing, 7 Paige, 583.

So a receiver will be appointed as a matter of course, where either partner has a right to dissolve the partnership, and the articles of partnership do not provide for the settlement of the concern, upon a bill filed for that purpose. Law vs. Ford, 2 Paige, 210. In Skip vs. Harwood, a receiver was appointed of the brewery. It was ordered that it should be referred to the master, to appoint a proper person to be receiver of the stock, goods, &c., of the brewery trade, and the debts due the partnership.—And in the meantime that the defendants to be restrained from alienating, disposing of, or removing any of the uten-

sils or dead stock belonging to the trade. (Coll. on Part., 354, Note 4.)

A receiver was appointed of a steamboat, where the owners disputed and required the court to settle their rights, and such receiver was required to run the boat. This was done for two years in the case of the steamboat 'Ontario,' but in that case the court observed that it was highly inconvenient, and unfit that such operations should be conducted under the direction of the court for so long a time; and an order for sale was accordingly made. (Crane vs. Ford, 1 Hopkins R., 114.) In this latter sentiment of the court, we fully concur. As it is not the province of the court to create a copartnership, so it is equally foreign from its functions to conduct its business. It never could have been contemplated, that a Court of Chancery, should become the superintendent of the private affairs of individuals,—its legitimate province is to adjust the rights, and settle the disagreements of parties, growing out of such transactions.

From the examination which we have made of the authorities on this subject, we think the law may be considered as settled, that whenever the intervention of a Court of Equity becomes necessary, in consequence of dissensions or disagreements between the partners, to effect a settlement and closing of the partnership concerns, upon bill filed by any of the partners, showing either a *breach of duty* on the part of the other partners, or a *violation of the agreement* of partnership, a receiver will be appointed as a matter of course.

The first three points made by the counsel for the appellant in his argument upon this branch of the case come clearly within and fully sustain the rule as thus laid down

and it is therefore unnecessary to notice them further than to remark that they receive our entire approbation.

But it was further contended by the counsel that the property having been taken possession of by the complainant, and being at the date of the application for the appointment of the receiver, in his actual possession, it was absurd and contrary to all precedent, that he should ask to have himself deprived of that possession. It is only necessary to advert to the facts of the case, as they appear in the record to show that the application for the appointment of the receiver, is not obnoxious to the charge of inconsistency or impropriety. By the terms of the written agreement herein before set forth, the *right* of the possession of the boat was guaranteed to Allen. By virtue of that right, he had taken the boat to Bainbridge, in the State of Georgia, as a safe place to lay her up during the Summer. While there, and in the absence of Allen, who had gone on a visit to the North, as he says, for the benefit of his health, the boat was levied upon by virtue of a writ of *fieri facias* issued out of the Inferior Court of Early county in the State of Georgia, and advertised for sale. For the purpose therefore of protecting the joint interest of the concern, Hawley, as one of the parties in interest, proceeded to Bainbridge, paid off the execution, and, doubtless fearing a repetition of the same thing, took possession of the boat and removed her out of the jurisdictional limits of the State of Georgia. In this whole transaction we see no evidence of any design or intention on the part of Hawley to assert any adversary *right* of possession to that acquired by, and belonging to Allen, under the terms of the written agreement before referred to. We think it therefore unfair to assume that Hawley had the absolute possession of

the boat at the time of the application for the appointment of the receiver. *His possession* was merely casual and entirely subordinate to the *right* of Allen.

The next position assumed by the counsel was, that a Court of Chancery has no power to appoint a receiver to *carry on the business of a copartnership.*

In this we fully concur, as a general proposition of law, and to ascertain its applicability, it becomes necessary to examine the terms of the order granted in this cause.

The order is in the following words, to wit: "It is further ordered that Archibald T. Bennett be and he is hereby appointed Receiver, to take charge of the Steamer Quincy, to prevent injuries from waste and decay and other casualties as far as may be practicable—to repair said boat so as to put her in condition for sale or such disposition of her as may be ordered by the parties, or as the court may order. The expense of repair and the like to be repaid by proper use of said boat." There is certainly nothing in the terms of the order from which it can be gathered that it ever was the design or intention of the court to invest the Receiver with authority *"to conduct the business of the partnership."* The assumption, we presume, is based upon the last clause of the order, which directs that "the expense of repair and the like, be re-paid by proper use of said boat," but we do not think even this clause, upon any fair principle of interpretation, will bear such a construction. It was evidently the design of the order, to relieve the copartners from the charge, by causing the boat to reimburse the outlay for repairs; and thus limited, it was altogether consistent with the strictest propriety. If the receiver has either exceeded or abused his authority as defined by the terms of the order making the appointment, and injury or damage has

ıereby accrued to any of the parties in interest, they have ıeir remedy on his bond; but most certainly, such trans-ːnding of his authority (if it has occurred) is not to be urg-l against the validity of the order.

The sixth, seventh, eighth and ninth positions assumed y the counsel in his arguments on this branch of the sub-ɔct, are already disposed of by the view which we have taken f the character of the title to this property, viz: that it is ot a tenancy-in-common, but a strict partnership.

Applying then to the case, the rule which we have here-ı laid down in regard to the appointment of a receiver, nd without going on an enumeration of the various harges set forth in the bill of the complaint, we are con-ːrained to say that the case presented, strongly demanded f the chancellor, the interposition of his power, to make ıe appointment.

The third ground of appeal mentioned in the appellant's etition is, from, "The Order of Sale of the Boat Quincy."

The entire argument of the appellant's counsel upon this ranch of the case, proceeded upon the assumption that ıe parties held their respective interests in the boat as ːnants-in-common and not as copartners. As before ob-ːrved, any argument made upon this hypothesis and the ıthorities cited in support thereof, becomes wholly inap-licable, from the decision which we have heretofore ar-ved at in considering the main question. There was no ɪceptions taken in the argument to the *terms* of the order. he only objection alleged in support of the appeal, was ɜ to the *authority* of the court to grant the order.

In Adams' Equity 461 (margin 245) the law on this sub-ɔct is thus laid down: "In order to effectuate the reali-ation of assets, the payment of debts and the distribu-

tion of surplus, the court has an authority over partnership estate, which does not exist in other cases of common ownership,—that of directing its sale and conversion into money. And this jurisdiction may be exercised, either by the same decree which directs a dissolution, or if dissolution has already taken place, by an interlocutory order."

There are many cases in which a Court of Equity will assist the settlement of partnership accounts, by decreeing in the first place a sale of the property. Where no provision is made for the disposition of the partnership property upon a dissolution, this exertion of equitable jurisdiction seems to arise necessarily, from that general principle, that the retirement of one partner is the dissolution of the whole society. Coll. on Part. § 307.

"It appears therefore that in all cases of a partnership at will, whether the contract was originally of that nature or has become so by effluxion of time, or other circumstances, a Court of Equity will, upon a dissolution decree a sale of the partnership effects, at the desire of the parties." ib., § 313. Upon a proposition so plain however, we deem it necessary to multiply authorities, and concludes on this branch of the case, by sustaining the propriety and validity of the order granted by the chancellor.

The fourth ground of appeal is from "the order refusing to dissolve the injunction and vacate the order appointing the receiver."

The injunction in this cause, was granted before answer, and the general rule of practice in such cases, is to dissolve the injunction where the answer fully denies all the circumstances upon which the equity of the bill is founded. Hoffman vs. Livingston, 1 John. Ch. R., 211; Livingston vs. Livingston, 4 Paige Ch. R., 111: Wake-

man vs. Gillepsy, 5 Paige Ch. R., 112 ; Cowles vs. Carter, 4 ibid, Eq. R. 150; Gibson vs. Tilton, 1 Blend, Ch. R., 355; William vs. Berry, 3 Sterr & Port. R., 284.

But there is no inflexible rule to this effect, for the granting or continuing of the injunctions, must always rest in the sound discretion of the court, to be governed by the nature of the case. This doctrine has been fully recognized and authoritatively established by this court, at its present term, in the opinion delivered in the case of Carter vs. Bennett, and is amply supported by the authorities therein cited. See also the following precedents:

Roberts vs. Anderson, 2 John Ch. R., 204; Poor vs. Carleton, Summer R., 70; Bank of Monroe vs. Schermerhorn, 1 Clarke R., 303.

In the case before us, although the equity of the bill is denied by the answer *in terms,* yet it shows a state of circumstances which raises strong equities; and we think it would have been improper to have granted the motion for a dissolution of the injunction. And we are equally clear in the opinion, that the motion to vacate the appointment of the Receiver, ought not to have been granted.

The fifth and last ground of appeal, is from "the order for the distribution of the funds arising from the sale of the Steamboat Quincy."

Upon this head the record affords but very meagre information. There is nothing but the bare order, setting forth the names of the several distributees, with the amount due to each, and as there was no objection made in the argument to the *correctness* of these claims, we are to consider them as admitted to that extent. We understand, however, the position of the counsel for the appellant to be this, that the debts having accrued through the action of

the complainant, in having repairs made upon the boat, he and he alone, is responsible for such demands, and that they should not be charged upon the proceeds of the sale. To sustain this position, the counsel cited numerous authorities to the effect, that one *part-owner* is not liable for repairs put upon a ship against his will, but that the part owner ordering the repairs will be alone liable for the same. The doctrine invoked by the counsel applies exclusively to cases where the owners hold as tenants in common, and not as copartners, and having already decided that the boat was partnership property, is not applicable in this case. The converse of that proposition, when applied to partnerships, is abundantly established by the authorities. It may be laid down as a general principle that each of the partners has a *specific lien* on the partnership stock not only for the amount of his share, but for monies advanced by him beyond that amount for the use of the copartnership; and that the share of each, is the proportion of the residue, on the balance of account. Coll. on Part., (Perkins Ed. § 125—127 ; Story on Part., sec. 360—441.

This disposes of the several grounds of appeal set forth in the appellant's petition of appeal, and it now remains for us only to remark briefly upon the general aspect of the case as presented by the record. It is quite apparent that the issue of this controversy has resulted most disastrously to the interests of both of the parties, causing as it has the total absorption of waste of the entire property. This result might and ought to have been avoided, if that spirit of amity and good faith, which should always characterize the intimate and confidential relation of copartners, had been properly observed. The hardship com-

plained of by the appellant is the legitimate fruit of his own conduct. Had he acceded to the very reasonable proposal of the complainant, to sell or purchase each others interests, the whole business might have been speedily and amicably adjusted, and a resort to the interposition of the court been avoided. But this, *according to his own showing*, he obstinately refused, and manifested a fixed determination to oppose the interests of his copartner, even at the sacrifice of his own. The event has resulted in the full consummation of that purpose, and if blame is to attach to any one, he must take it to himself.

The opinion of the court is, that the appeal be overruled, with costs; that the several interlocutory orders appealed from, do stand affirmed, and that the cause be remanded to the court below, for such further proceedings not inconsistent with this opinion, as may be appropriate.

WILSON AND HERR, APPELLANTS, VS. RICHARD HAYWARD, APPELLEE.

1. In case of a mortgage to secure notes payable at different periods the note which first falls due has the prior right to be satisfied out of the mortgaged property, unless there is some peculiar equity attached to the notes of subsequent date, and so as to the other notes.
2. In case of sale by a prior incumbrancer, the subsequent incumbrancer can

only complain by showing fraud in the sale, or that the property was more than sufficient to pay both debts, and that something remains for his benefit.

Appeal from a decree of the Circuit Court for Leon County, sitting in Chancery.

Richard Hayward filed his bill in the court below against the appellants and D. C. Wilson, administrator of the estate of J. H. Lunn, deceased, alleging that J. H. Lunn in his life time, and in June, 1840, executed to one Robert K. West, five several promissory notes, each for the sum of one thousand dollars payable respectively on the fourth day of June, in the years 1841, '42, '43, '44 and '45, and to secure the payment thereof executed and delivered to said West a certain deed of mortgage covering a certain lot and premises in the city of Tallahassee; that on or about the sixth day of March, 1841, the said R. K. West assigned and delivered to him, Hayward, the one of said notes payable in June, 1845, and at the same time assigned and delivered to him the said mortgage. That J. H. Lunn died in 1841, and in October of that year, D. C. Wilson was appointed administrator of his estate.

He further alleges that Jos. C. Wilson and John H. Herr composing the firm of Wilson & Herr, having become the holders of three of the notes aforesaid given by said Lunn and secured by said mortgage, instituted after said notes became due, their suit by petition on the law side of the Superior Court for Leon County under the act to authorize the foreclosure of mortgages in the courts of common law, and obtained a decree of foreclosure under which the mortgaged premises were sold and purchased by the said Wilson & Herr. That the said judgment and decree in the alleged suit for foreclosure were not and is not binding on him, because he was not made a party thereto, had no

notice of its institution, nor any opportunity to defend the same and to assert his rights in the premises. That said decree was obtained by Wilson and Herr by collusion with D. C. Wilson or in their names for his use and benefit; that D. C. Wilson employed the counsel to institute the proceedings against himself for foreclosure, waived the filing of the petition in the clerk's office four months before the first day of the term, waived the service of notice of intention to institute suit four months before the first day of the term at which decree was rendered and acknowledged it had been so given, when in fact it had not been given, waived the filing of the original deed of mortgage with the petition and the exhibition thereof to the Judge, required by the statute to be so filed and exhibited, and substituted a copy thereof from the record of deeds of Leon County without accounting for the absence of the original, and he also waived the affidavit of petitioner or their agent or attorney as to the sum claimed to be due, which is required by the statute.—That the said D. C. Wilson not only wholly failed to make defence to said petition but wrongfully and collusively allowed, suffered and permitted said judgment and decree to be entered up and passed immediately upon the filing of said petition.

Hayward further alleges in his bill, that the three notes held by Wilson and Herr, were received by them as collateral security, to secure the payment of a debt due to them by Robert K. West, and which debt was afterwards fully paid by West.

The bill concludes with a prayer for a foreclosure of said mortgage, and that the decree of foreclosure in favor of Wilson and Herr be vacated and set aside.

The note held by Hayward, and the mortgage afore-

said, were made exhibits and filed with the bill. On the mortgage is endorsed the following assignment:

"Whereas, Richard Hayward, has made himself responsible to Patterson and Hughes, for five thousand two hundred and fifty dollars, by endorsing his name on my paper, now in order to indemnify the said Hayward, and save him harmless, I do hereby transfer the within mortgage to him and for his use, until said debt and interest is satisfied.—Witness my hand this sixth day of March, 1841.

Test: John Wilson. R. K. WEST.

It was proved that Hayward had paid the debt to Patterson and Hughes, for which he was security for West.

David C. Wilson, administrator of Lunn, in his answer says, that on the first day of June, 1841 R. K. West being indebted to Wilson and Herr, in the sum of two thousand seven hundred and twenty-three 49-100 dollars, for which amount R. K. West had accepted their draft, dated 16 Sept., 1840, and being anxious to secure the same, and upon such security being given to obtain further credit, transferred to said Wilson and Herr three notes signed by J. H. Lunn for the amounts stated. That he being the correspondent and agent of Wilson and Herr and the manager and superintendent of their interest received from West the said notes as collateral for the payment of said amount of indebtedness; that when said notes were offered he, defendant, was of opinion that said West produced and offered five notes of the same amount, executed by J. H. Lunn, all of which, as he supposes, were secured by the mortgage which West also held and produced at the same time; that the impression is strongly fixed on his mind that he saw the note held by Hayward, (if it is one of the five mentioned in the mortgage aforesaid) in the possession of West posterior to the

sixth day of March, 1841. He therefore denies that the note was transferred to Hayward at the time stated and requires proof thereof, &c. He further says that at the time he received the notes from West to secure Wilson and Herr, he carefully examined the mortgage and there was then no assignment thereon.

He admits that as agent of Wilson and Herr, and having in his possession the evidence of the debt from West, he employed counsel for them and in their names to institute the proceedings to foreclose the mortgage mentioned in the bill of complaint, but asserts that there was no propriety, necessity or justice in resisting a claim of which he had full knowledge, and from which there was no escape, and that he wished to save the expense which all attempts to delay or defeat the claim would have produced. That at the sale of the mortgaged premises he caused the same to be purchased for Wilson and Herr and in their names, and that they are now the owners thereof.

Wilson and Herr allege in their answer that they became possessed of the three notes of J. H. Lunn by act of their agent, D. C. Wilson, who received them as collateral and to secure the payment of a draft of said Wilson and Herr, bearing date 16th of September, 1840, for two thousand seven hundred and twenty-three 49-100 dollars, drawn on R. K. West and accepted by him, that being the amount in which he stood indebted to them for goods furnished him previous to that time. They further allege that no payments were made by said West or any other person for him and on his account on said debt, and the whole amount thereof evidenced by said acceptance was due at that time of the foreclosure of said mortgage. They admit that D. C. Wilson, as their agent, had their interests in charge and

that he placed their claim in the hands of counsel for the purpose of instituting proceedings. West afterwards became indebted to Wilson and Herr, in the further sum of $2336.26 for which they drew their draft which was accepted.

The draft drawn by Wilson and Herr on West, to secure which the Lunn notes were assigned, was filed and is as follows:

BALTIMORE, 16th September, 1840.

Dollars, 2723 49-100.

Six months after date pay to the order of Mr. D. C. Wilson, Twenty-seven hundred and twenty-three 49-100 dollars for value received.

Your ob't serv'ts,
WILSON & HERR.

To MR. R. K. WEST,
Tallahassee, Florida.

(Endorsed.) R. K. WEST.

The following is a condensed statement of the accounts filed by Wilson and Herr with their answer:

R. K. West, To Wilson & Herr.

1840.		
Sept. 16.	To Sundries	$2723.49
	By amt. df't fav. D. C. Wilson, dated 16 Sept., 1840	2723.49
1841.		
March 19.	To acceptance due this day unpaid	$2723.49
June 25.	To Sundries	2336.26
		$5059.75

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1842.	CR.		
June 24.	By nett p'ds cotton per Kennebeck to Boston		$243.47
			$4816.28
To acceptance due 16 March, 1841,		$2723.49.	
" " " 25 Dec., 1841,		2326.26.	
		$5059.75.	
Less p'ds cotton per Kennebeck,		243.47.	
		$4816.28.	

R. K. West. To Wilson & Herr.

1839.		
Nov. 13.	To Sundries	$1276.86
1840.		
April 10.	To Sundries	683.83
Aug. 27.	5 p. c. Exchange on amount of our bill of 13 November, 1839, paid at Florida.	67.20
		$2027.89

1840.	CR.	
Aug. 27.		
By amt. p'd to D. C. Wilson & Co., and deposited by them in Union Bank of Fla. as per certificate,		$1366.46
1841.		
Jan'y 30.		
By Union Bank Post Notes,.....		661.43
		$2027.89

The petition in the suit instituted by Wilson and Herr, on the common law side of the Superior Court of Leon county to foreclose the mortgage aforesaid, appears in evidence in this case, on which is the following endorsement:

"Due and legal notice of the within, acknowledged by me this 22d August, 1843, all exceptions being waived as to the time required by the statute."

DAVID C. WILSON,
Am'r of J. H. Lunn, Dec'd.

A decree was entered in said petition suit, at the ensuing fall term of Leon Superior Court, for a foreclosure and sale, no person appearing to object thereto.

The following draft was filed as evidence in *this cause by D. C. Wilson,* together with the notes mentioned in the endorsement thereon:

Tallahassee, January 6, 1842.

SIR:—Please pay to the order A. K. Allison, Esq., one thousand dollars and place the same to the acc't of your ob't s'rt, EDW. M. WEST.

To D. C. Wilson, Tallahassee. [endorsed.]

Pay to the order of Mr. R. K. West—A. K. Allison.

Rec'd and paid this draft by way of discount and settlement with R. K. West, taking up four notes, viz:

One to D. C. and J. C. Wilson, and interest.	$120.51
One to D. C. Wilson & Co.,.....	380.22
" " D. C. Wilson,.....	212.82
" " " " "	160.32
	$873.87

The balance credited on account of
R. K. West,..... 126.13

$1000.00

The following receipts are also in the record as evidence in this case,

Tallahassee, June 10, 1840.

Mr. L. A. THOMPSON:

Please pay to Messrs. Wilson & Co., the proceeds of my claims against Thos. M. Bush, in your hands for collection, and oblige yours, &c., R. K. WEST.

[Endorsed.]

Rec'd from Thompson and Hagner the sum of nine hundred and fifty-two 72-100 dollars on account of proceeds of Bush's note, specified within. DAVID C. WILSON.

Aug. 7, 1840.

Rec'd from Thompson and Hagner, the sum of seven hundred dollars, being balance of funds specified in within order. DAVID C. WILSON.

August 10, 1840.

Rec'd Tallahassee, Oct. 23d, 1841, of Mr. R. K. West, one thousand dollars, viz: nine hundred and three dollars, Life In. and Trust Co. money, and ninety-seven dollars Union; this is to be credited on a draft of twenty-seven hundred dollars and upwards, belonging to Messrs. Wilson and Herr of Balt. Should there be any difficulty in getting off or making use of the Life In. and Trust Co. money, Mr. West is then to take it back, or pay in its place Union money or its equivalent, DAVID C. WILSON.

John Daffin, a witness for complainant, testified that in the spring of 1842, thinks it was in March of that year, be-

ing then engaged in business with R. K. West, he at the request of West, handed him one thousand dollars to be paid to D. C. Wilson, an account of a bill of goods which D. C. Wilson had purchased at the North for West. This sum was for Wilson and Herr, and was to be paid to D. C. Wilson as their agent. West returned shortly after receiving the money, and stated that he had paid it to Wilson. Saw no receipt for it, but is of impression that Wilson told him afterwards, that West had paid him one thousand dollars. The money handed by witness to West, was to be applied to the payment of the account of Wilson and Herr, dated June 25, 1841.

John Wilson, another witness examined on behalf of complainant, testified that the assignment of the mortgage to Hayward, was not executed in his presence, but was acknowledged by West, who requested him to witness said acknowledgment, which he did by signing his name at the bottom of said assignment. Does not recollect the date, but his impression was that it was sometime in the year 1841.

Robert K. West, another witness for complainant, testified that the assignment of the mortgage to Hayward, was executed by witness, who was mortgagee, named in said mortgage, and that said assignment was executed on the day it bears date, viz, sixth of March, 1841, and at the same time he transferred to complainant one of the notes secured therein. He further testified, that in January, 1842, E. M. West sold some cotton to Wilson, and drew a draft on him, Wilson, for one thousand dollars, in favor of A. K. Allison, who endorsed it to witness. This draft witness declares was used or given by him to Wilson, to pay the

Lunn notes, and was not used in a settlement with D. C. Wilson, of his own private claims against witness. He further states, that on the same day a few minutes after the cotton transaction, he called on D. C. Wilson, and demanded the notes already referred to. Wilson refused to give them up, saying that there was a balance of over three hundred dollars yet due, and when that was paid, he would give up the notes. He further testifies that he did not at any time exhibit the original mortgage to Wilson, it was at the time of the assignment of the Lunn notes to him in the possession of Richard Hayward, and had been since the previous March.

In answer to the cross interrogatories West declares that the assignment to Hayward, was made because Hayward was security for him on a note to Patterson and Hughes, for $5250.00, and he wished to save Hayward harmless.—He further states at the time he made the assignment to Hayward, he had but one note, Wilson had such of the others as were unpaid, hence the reason of his assigning that particular note to Hayward. At the time of the transfer to Hayward, he says he had no other notes of Lunn, they had been transferred to Wilson. He further declares in answer to the thirteenth cross interrogatory, that he paid the debt evidenced by the acceptance of the draft dated 16 September, 1840, to D. C. Wilson. He states that he cannot produce receipts for the different payments made thereon by him, as his store was broken open in 1849, and his pocket-book containing such receipts was stolen therefrom. On being asked whether the account filed by Wilson and Herr, commencing Nov. 13, 1839, did not exhibit correctly the proper charges and credits, and whether the

payments credited were not the only payments made by him, he states that he does not know whether the charges are correct or not. The credits he knows are not correct. The payments therein credited were not the only payments made by him on account of his indebtedness to Wilson & Herr. His receipts for other payments were lost with his pocket-book, which was stolen as before declared.

E. M. West another witness examined for complainant, says, that he has seen receipts of David C. Wilson, to and in possession of R. K. West, within twelve months anterior to the taking of his deposition—has no recollection of their amount—they were receipts for so much money without specifying on what account. Does not know where they are. That in 1842 he drew an order on D. C. Wilson in favor of A. K. Allison for $1000 with the understanding that Allison was to transfer said order back to said Wilson for and on account of R. K. West. Knows of no payments made by R. K. West or any one else on the draft accepted by R. K. West, either to D. C. Wilson or to Wilson & Herr. The draft or order drawn by him on Wilson was to be applied to the general account of R. K. West, with said Wilson, or such was his impression, as he knew of no particular bills or accounts between them. So far as he was concerned, R. K. West was at liberty to apply the said order as he saw fit.

David C. Wilson was examined as a witness on behalf of Wilson & Herr, who testified that he acted as agent for Wilson & Herr in their business transaction with R. K. West. He further states that the accounts filed by Wilson & Herr are correct, and that the drafts therein mentioned

and also filed by them of date 16th September, 1840, and 25th June, 1841, were never paid or satisfied. He further testified that R. K. West, was indebted to him previous to March, 1841, for which on that day he gave his several notes, promising to pay the same out of the proceeds of his cotton crop then growing, if he, witness, would continue to furnish him, West, which he did, to the amount of $157.34—100. In the fall of 1841, R. K. West, delivered at the Railroad Depot, 39 bales of cotton in the name of his son, and had it stored in the name of witness. E. M. West called on witness and demanded an order for the cotton, which was refused, until the notes of West to him, Wilson, individually and the account for supplies were paid. The said E. M. West declared the said cotton was not subject to the debts of R. K. West. Witness afterwards agreed to purchase the cotton, retaining one thousand dollars of the purchase money to be applied to the said notes and account of R. K. West to him individually.—This was done by the draft in favor of Allison, endorsed to R. K. West, and by the latter turned over to witness, and applied as stated. He states that the notes of West to him individually, were subject to the order of West, but he never called for them. He further declared that the notes of Lunn, were taken to secure the draft dated 16 September, 1840, which draft never was paid by R. K. West, or any other person. He received in the latter part of 1841, the exact time not recollected, from R. K. West or John Daffin, one thousand dollars on account of the two drafts of Wilson and Herr, and from the positive declaration of John Daffin, he is satisfied this payment was made on account of the draft of 25 June, 1841. Has no recollection of any other payments.

The complainant at the proper time objected to the competency of David C. Wilson as a witness for Wilson and Herr, because he was a party to the record, and because of his interest to defeat the complainant in the remedy sought by his proceeding.

The Court below, decreed the sale of the premises under the decree of foreclosure in favor of Wilson and Herr, to be set aside, vacated the said decree, and directed the parties to be paid according to their respective interests, out of the proceeds of the mortgage premises when sold, in *pro rata* shares; and to ascertain the amount of their respective interests, a reference was made to a master.

From this decree Wilson and Herr appealed.

D. P. Hogue for Appellant.

1. The appellant had a right to foreclose the mortgage as they did, either at law or in equity. The statute gives the right when the debt is due, both to the mortgagee and assignee.

The appellants were assignees of the three notes received by the mortgagee, which fell due before the note held by the appellee; and it is unnecessary to cite authority to maintain the position, that the assignment of the notes carries with it the security of the mortgage.

2. Where there are several notes secured by the same mortgage, the right of the assignee of one note to foreclose when the note falls due, necessarily results from this doctrine: He is not bound to wait until all the notes fall due, but may proceed when the mortgage debt is due, and he is entitled to the whole mortgage subject, if it takes it all to pay his demand. (1 Bibb 150, 1 Randolph 466, 10 Smeede & Mar., 631, 6 Howard, 320.)

3. In Alabama it has been held that the first assignee of one of several notes is entitled to priority of satisfaction out of the mortgage property. (See 4 Ala., 452; 9 Ala., 648.)

4. In this case the appellants were not only the assignees of the notes which first fell due, but they were, as the evidence shows, actually prior assignees; for it is not proved on the part of the appellee, that he held the mortgage deed by assignment anterior to the date of the transfer of the notes held by appellant.

5. The assignment of the mortgage without the debt is considered to be without meaning or use. In this case, the assignment of the mortgage is clearly defective, not being under seal. (5 Halst., 156.)

6. The appellee, if entitled to any thing, is only entitled to a *pro rata* share of the proceeds of the sale under the first foreclosure, and this he can only have upon a bill filed against the purchasers, who are the appellants—Wilson and Herr. He cannot have a decree of foreclosure against D. C. Wilson, the administrator of Lunn. (2 Florida, 27.)

7. As to the substantial compliance of the administrator with the requirements of the statute, I think there can be no doubt; the notice given fully meeting the views of this court in the case of Laverty vs. Filyaw. (2 Fla.)—The claim of the appellee was not presented within the time prescribed by law. (Thom. Dig., 206.)

8. The appellee has slept upon his rights, if he had any, and is not now entitled to the favor of a Court of Equity.

9. The decree of the court below is erroneous, because

it makes no allowance for improvements of great value upon the premises.

10. The first decree of foreclosure, and the sale under it, having been made by a court of competent jurisdiction, upon a subject properly before it, ought not to be vacated and set aside, unless it was obtained by fraud or collusion, and of this the record furnishes no proof.

M. D. Pappy, for Appellee.

The judgment of foreclosure in favor of Wilson and Herr, is a nullity as to Hayward and is not binding on him, because,

1. He was not made a party to the proceedings, although he was not only interested as the holder of one of the notes, secured by the mortgage, but was the legal holder of the mortgage itself by assignment, and

2. Because the said judgment of foreclosure was not warranted or authorized by the statute under which the proceedings were had.

"The party claiming a judgment of foreclosure at law, shall be the owner of all the notes, the mortgage was given to secure, and without it is not entitled to judgment. (Wilson, Adm'r of Lunn vs. Hayward, 2 Fla. R., 27.)

There can be no foreclosure until the parties entitled to the whole of the mortgaged premises are before the court. (1 Eng. Chy. R., 215, 217, 1 Bro. Chy., 368.)

Wilson and Herr as assignees of some of the notes secured by the mortgage, had no such interest in the mortgage itself as authorized a foreclosure at law, for the assignment of the notes did not carry the mortgage *at law.* In ***Equity*** the assignment of the debt carries with it the mortgage through the medium and circuity of a trust by implica-

tion. (1 Story's Eq., 353, Roberts on Frauds, 272, 4 Pick., 131.)

Such was the view of the Legislature, for the statute of this State in reference to mortgages authorises, the assignee of a mortgage to take the steps and pursue the same remedies as the original mortgagee, and it declares that all petitions for the foreclosure of mortgages under and in pursuance of its provisions, *together with the original mortgage,* shall be filed in the clerks office at least four months, when the foreclosure is to be of real property, and two months if of personal, before the term of the court at which judgment of foreclosure can be demanded.—(Thomp. Dig., 376, 377.)

To entitle a petitioner to pursue the remedy provided by this statute, he must be the legal holder of the mortgage, for if he is not such *legal* holder, he not only cannot according to general principles, pursue any *legal* remedy, but he cannot file the original mortgage as required by the statute. As assignees, of the notes simply, the remedy of Wilson and Herr to foreclose the mortgage was in Equity, for it is only in that court that the proper parties could be made, and that court only has the power to declare through the medium of a trust that the assignees of a note secured by a mortgage, is entitled to the benefit of the security. If it be true that Wilson and Herr had no interest in the mortgage at law, it having been assigned to Hayward, how could they have obtained a foreclosure at law, except by collusion with or the default of D. C. Wilson, admi'r of Lunn. And can it be held to be law, that Hayward who was not made a party to the proceedings, who held the original mortgage by assignment,

is to be concluded by the judgment rendered in favor of Wilson and Herr.

2. Hayward having received the assignment of the mortgage, and one of the notes prior to the time, when the other notes were assigned to Wilson and Herr, as we contend, is entitled to priority. (4 Alabama, 452, 9 Ala., 645.) The written evidence of the assignment is better than any of the declarations of the witnesses.

3. At all events Hayward is entitled to a sale of the mortgage premises, and to a *pro rata* share of the proceeds, and if not such *pro rata* share, then to the surplus that should remain after paying Wilson and Herr what is due on the draft, (if any thing remains due,) to secure which the Lunn notes were assigned.

4. The evidence of D. C. Wilson should be rejected, because he is a party to the suit, and because he is interested to defeat the complainant.

BALTZELL, C. J., delivered the opinion of the court.

This case was before us at the January term, 1848, on an application of the defendant, Hayward, to foreclose under the common law proceeding of this State, a mortgage executed by James Lunn. The proceeding was against the administrator of Lunn, who resisted the application on the ground that other parties holding notes of prior date, had already foreclosed and had sale of the mortgaged property.

The court considering that if the party had rights, they could be more appropriately asserted in equity than in a court of law, and especially that the purchasers under the sale already had, should be made parties so that a second sale should be avoided if possible, and the conflicting rights

and interests of the different parties properly adjusted, sent the case back with that view. It is now before us, with new parties and the facts presented are as follows:

Robert K. West was the owner of a mortgage on part of lot 167, in Tallahassee, executed to him by James Lunn, on the 4th day of June, 1840, to secure payment of five promissory notes, for one thousand dollars each, payable the 4th days of June, 1841—42—43—44 and '45.

The first note seems to have been paid, the second, third and fourth, falling due in 1842—43 and '44, were assigned and transferred by West on the first day of June, 1841, to Wilson and Herr. On the 22d of August, 1843, two of these notes having become due, these parties filed their petition of foreclosure, and in January, 1844, procured a decree or judgment of the Superior Court for Leon county, under which the property was sold to pay said debt by the marshal.

The complainant, Hayward, claims to be the assignee of the last note, and of the mortgage by transfer bearing date the 6th of March, 1841. His bill alleges that the decree of Wilson and Herr, was obtained by collusion and that he is entitled to prior payment by virtue of his previous assignment, as well of the note as of the mortgage.

The enquiry becomes an important one in the very outset, whether Heyward in fact has the prior assignment.—In his bill he proposes to the defendants the question directly and expressly, whether West did not on or about the 6th of March, 1841, indorse and deliver the said note of Lunn, for one thousand dollars, and whether he did not at the same time assign the mortgage. In reply to this, D. C. Wilson says: "when the notes received by him for

Wilson and Herr, were offered, he is of opinion that said West produced and offered five notes of the same amount executed by the same person, all of which, as this defendant supposes, were secured by the mortgage which said West held and produced at the same time. That if the note which complainant holds is one of the five notes mentioned in said mortgage, it could not have been assigned and transferred to him on the 6th of March, 1841, if he is correct in the impression strongly fixed on his mind, that he saw said notes in the actual possession of said West, at a date posterior to the said 6th of March. He therefore denies and calls for proof of the time of the alleged transfer to complainant.

Robert K. West is questioned for complainant on this point, and says in his direct examination, the assignment of the note and mortgage were made at the day they bear date, 6th of March, 1841.

In his cross examination however, being asked how many notes he had in possession at the time of this assignment to Hayward, he says he had but one, Wilson had the other two, hence the reason of my assigning that particular one to Hayward. Again, being asked at the time of the transfer to Hayward how many of said notes of Lunn he had assigned, he replies, "that at the time of the transfer to Hayward he had assigned none but the two and those to D. C. Wilson, making in all three notes." Again asked if he had other notes of Lunn in his possession falling due anterior to this transferred to Hayward, why he did not transfer them also, his reply is, "I had no other notes of Lunn at the time, they had been transferred to D. C. Wilson." His account of the transfer to Hayward is as fol-

ows: "I made this assignment because Hayward was security for men on a note to Patterson and Hughes for $5,250, nd I wished to save him harmless. When I found the rush was coming upon me I went to him and told him of t and said to him here take this, satisfy yourself and gave im the mortgage and the note of Lunn attached to it."— ndependent of the repeated declarations by him that he had ssigned the prior notes to Wilson and Herr, this last statenent strikes us as corroborating it with great force. Why f he was so anxious to secure Haywood in so large a sum nd had four notes secured by mortgage, does he give only ne for $1000 and that, the last due of five and payable at he distant period of four years?

We are of opinion then that Haywood took his note and he assignment of the mortgage after the other notes were ssigned to Wilson and Herr. Having ascertained that the otes obtained by the latter fell due first and were assign-d and transferred first, the question arises as to the law of he case. As a general rule the assignment of a note se-ured by mortgage is in equity an assignment of the mort-gage unless there is some special provision by the parties o the contrary. Where several notes have been assigned s in the present case lies the difficulty.

The first case on the subject was decided by the Court f Appeals of Virginia, and is the leading case. A deed of rust was executed by William and Francis Sutten to trus-ees to secure payment of three notes to Barrett. The first ote was paid, the second transferred to Ragland without ny assignment to him of the deed of trust, the third en-lorsed to the Gwathmeys who took an assignment of the leed of trust for their security. The trustees having ad-

ised the land for sale to pay Ragland's claim, the
athmeys filed a bill against Ragland and the Trustee to
oin them from selling the property. An injunction was
nted which was dissolved and the case taken to
e Court of Appeals. The Court say that the deed
Trust being intended by the parties to it as ad-
itional security for the payment of the notes to Barrett or
is assigns in the order in which they fell due, it followed
he notes into the hands of several holders thereof and
hat it was not competent to Barrett by an assignment of
the deed to the Appellants, without the assent of the Appel-
lee, to whom the second notes had been assigned to deprive
him of his priority of right to demand a sale of the proper-
ty, if necessary to the payment of the note assigned in the
order of payment expressly directed by the deed. The
deed being assigned to the appellants, gave them full no-
tice of the order in which the notes were to be paid to Bar-
rett or his assigns, and at least, put them on the enquiry
whether the first and second notes had been paid at the
time they took the assignment of the third note and of the
deed of trust. By not making that enquiry, if they relied
on the trust fund as security for the payment of the note
assigned to them, they may have lost their money; howev-
er that may be as against the appellee, the court is of opin-
ion that he has no claim to be preferred. Gwathmeys vs.
Ragland, 1 Rand. 466.

The Supreme Court of Indiana says: "the meaning and construction given to a mortgage payable at different times by several promissory notes, must depend upon the law of the remedy upon such notes or mortgage for these contracts as well as others are made under and with an

eye to the laws governing their enforcement. In this State a mortgage may be foreclosed, when there are instalments, on default of payments of the first instalment. The holder of the first note may, if he chose, when that becomes due, enforce the full payment of it out of the mortgaged premises, and the holder of the second note may in like manner obtain priority over the third, and so on. State Bank vs. Tweed's, 8 Black, 447. This is also the rule in New Hampshire, 10 N. H.

In Alabama a different rule prevails; there the prior assignment seems to give preference of payment in case of deficiency of the mortgage fund. (Collum vs. Erwin, 4 Alabama, 458.)

In that case the court admits that in 5 Porter and also 9 Porter, 527, McVoy vs. Bloodgood, the same court had decided that the assignee of the notes which first fell due, would have the prior right. They say that the same decision with the one established by them was made in Gwathmey vs. Ragland, under precisely a similar state of facts.

They also refer to Van Rensaleer vs. Hopkins, decided by the Supreme Court of New York. In reference to this case as well as the one just alluded to, we think that intelligent court was mistaken. Van Deusen says the court had two mortgages, the first he assigned to Van Rensaleer for $1180; though made to him it was intended for the use of Van Ransaleer, and to secure him the unpaid balance of the land which he had sold Van Deusen. Van Deusen therefore in effect received and held the mortgage for $1180, in trust for Van Rensaleer, and his intention was that this mortgage should become the first incumbrance by a prior registry, &c.

The assignment to Van Rensaleer was thus not merely an arbitrary preference by Van Deusen of the original mortgage to the mortgage retained, but it was a just discharge of duty, a fulfillment of the confidence which Van Rensaleer had reposed in Van Deusen, and a substantial compliance with the antecedent rights of the parties. 1 Hopkins.

It is very true that the prior assignment is alluded to, but it will be perceived that the case is principally decided upon the peculiar equities of the case as existing between the parties. Equally unfortunate is the reference of the court to and reliance upon the case of Gwathmeys vs. Ragland. We have seen already that this case is not authority for payment to the party having the first assignment or transfer of the note, in preference to the one whose note fell due first.

In Mississippi a different rule still is held, as the courts divide the proceeds of the sale of the mortgage property amongst all the notes agreeing with none of the authorities to which we have alluded. Here again the Virginia case is regarded as not being in conflict with the rule established by them. The leading case is that in 6 Howard 320, and with due respect to the very high intelligence and ability of that tribunal, the equity of the case and the rights of the parties depend on the peculiar facts and circumstances of the case, rather than the maintenance of any rule or principle of law obtained from the authorities cited.

Whilst we are free to declare our own opinion in favor of the Virginia rule as best agreeing with analogy, as most certain and definite, leaving less to uncertainty and

confusion, whilst we admit that there are equities to change its application, as in the New York and Mississippi cases, and in the case of a mortgagee claiming after the assignment of part of the mortgage debt, yet it is unnecessary in the present case to assert the superiority either of the rule of the Va. or Ala. courts. It is sufficient that the adoption of either is fatal to the case. The complainants Wilson and Herr have the first assignment of the notes; their notes were first due by the terms of the mortgage. They obtained a decree of foreclosure in January, 1844, and the property was sold on the fourth of March, 1844, upwards of a year previous to the time Hayward's note became due. If Hayward has an equity, it must be because the property is worth more than the claim of Wilson and Herr, or there has been irregularity or fraud in the sale to invalidate it.

There is no allegation in the bill as to the value of the property, no assertion that it is more than sufficient to pay the three first notes. The complainants' bill is predicated on his prior right and equity. The amount bid at the sale is no where stated, tho' Wilson says in his deposition, "the property brought but a small proportion of the draft ($2,729). There is then no propriety in ordering another sale; this would be a vain and fruitless thing.

Is there an irregularity in not making Hayward a party to the judgment of foreclosure. As a general rule all incumbrancers should be parties. Prior incumbrancer's rights are paramount, and they would seem to be necessary if not indispensable parties 7 Paige 444, 2d Alaba. 415, 2 Ed. Chy. 127.

A subsequent incumbrancer is not an indispensable par-

ty Cullum vs. Batie, 2nd. Ala. 415, Walker vs. Bank Mob. 6 Ala. 452.

A second incumbrancer is only affected and can only complain when there is a surplus after paying prior liens. His right to the surplus cannot with propriety arise until it shall be ascertained that there is a surplus, and this cannot be shown before the mortgaged premises have been sold and the debt of the prior incumbrancer with all costs fully discharged. 2 Alabama 422.

The English practice is to allow the subsequent mortgagee to redeem by paying up the prior mortgage. Coote 522.

It remains to notice another allegation of the bill, that the judgment of Wilson and Herr was obtained by fraud; the defendants employed counsel to institute suit against himself—waived the filing of the petition four months before the first day of the term; waived the filing of the mortgage and substituted a copy thereof, and wrongfully allowed judgment to be entered up immediately. The answer of the parties denies collusion, and we find not a particle of proof to support it. The facts stated even if true, by no means constitute fraud. The defendant alleges that he had no defence to the suit and desired to avoid delay and expense; what objection then was there to a direct confession of judgment without previous preliminary proceedings?

In the case of Finley vs. Bank U. S., the bill was filed at the November term, stating the consent of the mortgagor to an immediate sale of the mortgaged property although the *day of payment had not arrived,* and on the same day an answer was filed consenting to a decree for the sale. A decree was immediately entered by consent of parties di-

recting the Marshal to sell the property, and yet no one complained of this as irregularity, much less fraudulent, although the decree was assailed by a prior mortgagee. 11 Wh. 304.

Independent of this, it is not allowable to attack a judgment collaterally by asserting irregularities that might form the subject of reversal in an appellate Court. A judgment concludes the subject on which it acts, and those things are regarded as proved and done which ought to have been proved to entitle the party to judgment. Grignon's lessee vs. Alston, &c., 2 Howd. S. C. R. 343, 3 Peters 204, 5, 10 Peters 473.

On the whole case we see no ground for disturbing the sale or for ordering another sale. The decree of the Circuit Court will therefore be reversed and set aside, and the case remanded with instructions to dismiss the bill with costs.

The following petition for a re-hearing was afterwards filed:

PETITION FOR REHEARING.

Richard Hayward, appellee in this case, asks the Court for a re-hearing of this cause, on the following grounds:

I. The Appellee's Counsel in this case supposed the case as was ordered by the decree of the Court below, would be referred to a master, to ascertain the amounts due respectively to Hayward and to Wilson and Herr, when it could be shewn that nothing was really due to the latter and therefore, he did not think it proper to discuss it here. But as the Court orders the bill to be desmissed, Appellee respectfully asks the Court to open the judgment in this case,

that he may now be permitted to show that the debt to Wilson and Herr was fully paid before they obtained their foreclosure at law.

II. The debt due for which West assigned the notes to Wilson as collateral security, has been paid.

It appears from the answers of D. C. Wilson, and of Wilson and Herr, that on the 16th day of September, 1840, West only owed Wilson and Herr $2723.49, for which amount, they drew a draft on West in favor of D. C. Wilson, and which draft was accepted by West. No other evidence of indebtedness exists in the record. Wilson states in his answer that "*on the first day of June,* 1841, *West being indebted in the sum of* $2723.49, *for which amount, West had* accepted their draft, and being desirous to secure it and upon such security being given to obtain *further credit,*" &c. Wilson and Herr says that the sum of $2723.49, the amount of the draft, was the sum due them for goods, &c., *furnished before that time.* From all this, it is clear, that no other sum was due from West than the amount of said draft.—There is no pretence that there was any other sum due to which any subsequent payment by West could be applied. Certainly there is no proof of any other indebtedness.—Neither Wilson nor Wilson and Herr pretend or allege that there was any other indebtedness. See the answer of D. C. Wilson and of Wilson and Herr. To secure then the only indebtedness from West to Wilson and Herr, on the 1st June, 1841, West assigned the notes mentioned in the record as collateral security, which notes were to be returned when the draft for which they were a security should be paid. We repeat there is neither proof nor pretence that there was any other indebtedness from West on the

first day of June, 1841, than the draft for $2723.49.

Now if that sum was all he owed them at that time, the next question is what has he paid them since the draft was given which ought to be credited on it.

The first payment of which we have any evidence is that of $661.43, made on the 30th January, 1841, as appears from their accounts filed with their answers. This credit, it is true, is placed on account for $2027.84, but let it be recollected that this account is all for goods furnished before the date of the draft for $2723.49, and which latter amount, by the answers of Wilson and Herr and D. C. Wilson, was all that was due Wilson and Herr at the date of the draft, viz : 16th *September,* 1840. This account it will be seen, was for 1839, &c., and consequently does not and did not constitute any evidence of debt, especially as the defendants themselves do not claim any other indebtedness up to 16th September, 1840, than the amount of the draft. It was asked why this amount of $661.43 not credited on the draft ?

Can it be said that it was appropriated by Wilson and Herr to the payment of an indebtedness other and anterior to the draft, for goods sold before the date of the draft. We answer that there is no evidence or even pretence of any such indebtedness, but on the contrary, Wilson and Herr in their answer say *that the draft was the amount in which West stood indebted for goods furnished previous to its date.* No witness swears to any debt, nor does West acknowledge any but the draft. The simple presentation of an account subsequently, without any evidence, and against their own statements, does not authorize them to apply a payment made subsequently to the

date of the draft, which they acknowledge was all that was due to them.

The account is evidence of the payment to them, but no evidence of indebtedness. Even if the account was correct, it should have been proved, but we cannot presume it to be true, when the parties themselves say the draft was all that was due. But if it is claimed that this account is just and correct, let us enquire if it was not itself also paid. By it it appears that in August, 1840, West paid D. C. Wilson $1366.46, and by the receipts in the record, it is seen that Thompson and Hagner paid to Wilson 7 August, 1840, $952, and 10 August 1840, $700 by order of West. These last two sums together, make $1652, yet we find no credit for them anywhere. This will go to strengthen the declaration of Wilson and Herr themselves, that on 16th September, 1840, the amount of the draft was all that was due to them. Again, the item in said account,) dated 27 August, of "5 *p. c. exchange on amount of our bill of* 13 *November,* 1839." (The very date of this account, *"paid at Florida,"* shows that this bill or account was paid when the draft of 16 September, 1840, was accepted, and furnishes still stronger proof, (although there is no proof of such indebtedness,) that Wilson and Herr were right when they say in their answer that the amount of the draft was all that was due them.

But why multiply instances when the parties themselves make no pretence of such a claim. There being no such claim, then the payment of $661.43, as of 30th January, 1841, should go as a credit on the draft. We cannot go behind the draft of 16th September, 1840, to enquire into the state of the accounts before that time.

The defendants say themselves that the draft was for $2723.49, *"that being the amount in which he stood indebted for goods furnished previous to that time."* But if they had not said so, the presumption of law would be the same, for the law will not presume that a creditor will do so foolish a thing as to take the acceptance or promissory note of his debtor for a subsequent debt, and leave a prior debt unprovided for. The law presumes a prior debt, in such a case, to have been paid.

We will take the 16 Sept., 1840, as our starting point. At that date West owed D. C. Wilson or Wilson and Herr a sum which with interest on it for six months, (the time when the draft became due,) made it amount to $2723.49 for which West accepted a draft. One month and half before the maturity of the draft, to wit: 30 January, 1841, West made a payment of $661.43-100, he is entitled to interest on this payment until the maturity of the draft, to wit: $2.29, which with the principal makes $663.63.— Deduct this from the draft and it leaves on the draft $2059.86, due 16 March, 1841.

The next payment, (see Wilson's receipt in the record,) was made on 23 October, 1841, amounting to $1000.00.— Wilson in his answer to the fourth interrogatory, states that he is satisfied this payment was made, for and on account of a draft for $2336.26, and yet his receipt shows the contrary.

On the production of this receipt, Wilson's counsel abandoned such application, and yielded the point that the payment was made on the draft for $2723.49. This shows how much Wilson's recollections are to be relied on. Add now the interest (97) from 16 March, '41, to 23 Octo-

ber, '41, to $2059.86, the balance due on the draft on 16 March, and we have $2156.86, and then credit the payment of $1000.00, there remains $1156.86 due on the draft on 23 October, 1841.

The next credit we contend for, is that of $1000.00 made January 6th, 1842. It is true of this payment as of the other that D. C. Wilson denies that it was made as a payment on this draft. Being mistaken as to the other we will show that he is equally so as to this. But before discussing his testimony in regard to this payment, I premise that his testimony should be entirely rejected.

1. Because he is a party to the record, &c.

2. Because of his interest in the case.

The objection to Wilson's competency was made before he was examined, as the record will show. A party to the record is sometimes allowed to be examined as a witness, but only where an order of court for that purpose is first had and obtained.

Again, he is clearly interested. He claims a right here by his own testimony, of appropriating to himself a payment which West, who made it, swears was appropriated by him, at the time, to the draft, or to Wilson and Herr.

If the court shall decide upon his testimony that he properly retained for himself the payment, he makes a thousand dollars. If the court shall decide on the testimony of West, that the payment was on the draft to Wilson and Herr then he loses a thousand dollars. I can imagine no clearer case of interest. But let us continue to pursue the facts.

We have in evidence a check drawn by E. M. West on D. C. Wilson for the amount of this last payment in favor

of A. K. Allison who endorses on it, "pay to the order of R. K. West." Then we have the positive assertion of R. K. West that his order was that it should be applied in payment of the draft to secure which the Lunn notes were assigned. West in answer to the nineteenth cross interrogatory, says: "It was not used by me in a settlement with D. C. Wilson, but was given to pay the Lunn notes." Again, in answer to the 4th question he says: "on the same day a few minutes after the cotton transaction, I called on D. C. Wilson and demanded the notes already referred to. Wilson refused to give them up, saying there was a balance of over three hundred dollars yet due." This makes out a plain case. The check is endorsed pay to the order of R. K. West, and West swears that his order was that it should be paid on the Lunn notes. A debtor has the right to apply a payment to whatsoever debt he pleases. This principle is always recognized in every court. David C. Wilson, without denying this, seeks to justify the appropriation to himself by speaking of some transaction between himself and Edward M. West and A. K. Allison. But it is submitted that what occurred between himself and Allison and E. M. West has nothing to do with the question. Here then is the undenied oath of R. K. West. West never consented that the check to Allison should go to an alleged indebtedness by him to D. C. Wilson nor does Wilson pretend that he ever did. A further evidence of the fact that he did not consent is the pregnant fact that he did not at that time or at any time subsequent, take up the notes which Wilson alleges he held against him and *produced in evidence by Wilson himself with his own endorsement on them.* West not only had the right to *order* the Allison check

to be applied to the draft, secured by the Lunn note but did absolutely so order. It is presumed that his testimony is entitled *to more weight on this point* than that any other person, particularly Wilson, who, it is shown, is deeply interested. West's testimony, it is believed, is on this point, uncontradicted.

Add then to the sum due $1156.86, interest to 6th January, 1842, $19.28, and we have $1176.14, from which deduct the payment of a thousand dollars and it leaves due only $176.14, 6th January, 1842.

The next payment of which we have any evidence is that of June 24, 1842, as shown by the account in the record, viz: "by nett proceeds of cotton per Kennebeck to Boston his proportion" $243.47. I know no reason why this amount should not be credited on the draft of 16 September, 1840, at least enough of it to pay the balance due on said draft. That balance as we have seen was $176.14 on 6th January, 1842. Add interest $6.36 and it makes $182.50 due on 24th June, 1842, on which day $243.47 were paid, which paid the whole balance of principal and interest due on said draft of 16 September, 1840, and left $60.90 overplus.

It is true there is no direct testimony in the record of the specific application of this last payment, to the balance due on the draft of $2723.49. The only application as shown by the record, is to the joint amount of the two drafts, viz: the one for $2723.49, and the one for $2336.26.

Acccording to this application, one half of the payment of $243.47 belongs to the balance due on the draft, viz: $182.50 which would leave due only $60.

But we maintain that the whole of the $243 or so much

thereof as was sufficient should be applied to extinguish the balance of $182.50, due on the draft of $2723.49, according to the principle admitted by this court, in the case of Smith and Paramore vs. Randall, 1 Florida, 428, and cases there cited. In the case of Devane vs. Noble, cited by the court, 1 Merivale, 606, the master of the rolls says : The debtor has first the right to apply. If he does not then the creditor. If neither apply the payment, the law makes the appropriation; and the rule of law, is to apply to the most burdensome debt,—one that carries interest rather than one that does not. And if the debts are equal, then *to that which has been first contracted.* And if there are other parties interested, *the justice of* the case requires that the application should be made for the benefit of such other parties. So that in whatever light this last payment is viewed, the conclusion must be that it extinguished the whole of the draft for $2723.49, for which the Lunn notes were transferred as collateral security.

It thus seems most incontravertibly that the claim of Wilson and Herr on the Lunn notes ceased before they instituted their suit for a foreclosure, and they ought to have returned those notes to West according to the agreement of Wilson in the record.

Hayward had no opportunity in the suit of Wilson and Herr vs. D. C. Wilson, administrator of Lunn, to show these facts, as he was not made a party. Wilson who conducted the whole affair for both parties, was interested in the whole business, and if Hayward is not permitted to claim that the foreclosure decree is all wrong, in a proceeding in which he makes all persons concerned, parties then there is no remedy left him, and no means allowed to

show that when the foreclosure was obtained, Wilson and Herr had not a particle of interest in the mortgage; for let it always be remembered, that the Lunn notes were not assigned out and out in payment of Wilson and Herr, but only as collateral security, and by agreement, they were to be returned when the draft of $2723.49 was paid.

We are not left to the deductions I have made from the whole evidence to show that nothing was due on the draft of $2723.49. West in his evidence says, that that draft *was fully paid by him.* Is this statement of West a simple wanton assertion? The facts in the record distinctly show that his statement is correct. This statement of West goes further, and shows that he intended the last payment of $243.47, to be applied to pay off the final balance due on that draft. *West says that the draft was paid.* This is his testimony, as positive as any declaration made by him, and the other separate *facts* in this record prove the same thing, notwithstanding the statement of D. C. Wilson, who is deeply interested in this cause.

Counsel for appellee, begs leave to present another point not presented in the argument, viz : That if he is right in the position that the foreclosure at law, was not warranted by law, even if there was any balance due on the draft, then we say that Wilson and Herr having taken possession of the mortgaged property, have been paid more, than was due them, and more than the value of the improvements by the receipts of rents and hires.

Let us next enquire whether Wilson and Herr, had really any interest in the Lunn notes. The draft for $2723.49, was in favor of D. C. Wilson individually. The acceptance of said draft by West made it a debt to D. C. Wilson,

l to D. C. Wilson did West assign the Lunn notes as
aterals. This being so, D. C. Wilson, and not Wilson
l Herr, could foreclose the mortgage. But D. C. Wil-
could not sue himself, as adm'r of Lunn, and he pro-
ed a lawyer to bring suit against himself, in favor of
son and Herr. Here is the anomaly of a personal hold-
a debt against himself, procuring a suit to be brought
he name of a third person, without making anybody par-
, or giving them an opportunity to show that really
re was nothing due.

f I have succeeded in showing that the draft for which
Lunn notes were *collateral* security, had been fully
d before the foreclosure suit, then I maintain that Rich-
Hayward has in this proceeding the right to have the
ree of foreclosure, aforesaid set aside and a decree in
favor to foreclose the mortgage. Any other result un-
such a state of things, would be grossly unjust, and
ld be a premium to men to act wrongfully.

For these reasons, counsel for appellee, respectfully
ys the court for a rehearing in this case.

The rehearing being granted, and after argument,
LTZELL, C. J., delivered the following opinion of the
rt on the matters presented in the petition:

OPINION ON PETITION FOR REHEARING.

The subject of payment of the mortgage note, held by
lson and Herr, on which judgment of foreclosure was
l, was not presented to us in argument, but considered
abandoned and so treated in the opinion delivered by
court. The counsel for complainant, has explained
s omission by saying that a reference was had to the

master in the court below, to ascertain this fact, and under the impression that the case would go back and this subject be thereby ascertained, he did not think proper to discuss it here. Inasmuch as the unexpected turn which the case has taken, cut him off from this resource, and inasmuch as the point of payment, was in his consideration, vital to his client's case, the court on his application granted a rehearing, which has been had and we now proceed after due deliberation, to give the conclusion to which we have arrived, premising that nothing has been wanting to present the case which the zeal and industry of counsel could effect.

No doubt if payment was made of these notes, before judgment, the right of complainant to relief is clear and unquestionable. He alleges payment in general terms, without specifying particulars, or items, or sayings when, or how, or by whom payment was made. He calls upon defendants to state whether any and what payments were made by said West, on account of said debt and how much was due thereon at the time of foreclosure, and that a full statement be made and exhibited, showing the amount of said debt and all payments made thereon, and securities realized and its true condition." To this, defendants answer that "no payments were made under said debt, and the whole amount was due at the date of said foreclosure, and they exhibited a full and perfect statement taken from the books of the firm of Wilson and Herr, showing the bill of goods at various times, sold to said West by said firm and the payment made thereon, to which they refer as a true and accurate exhibit of their business and dealing with said West."

This exhibit presents three different accounts, the first for $2027.89, dated 13th November, 1839. The second for $2723.49, dated the 16th September, 1840, secured by three notes of Lunn of $1000 each. The third for $2336.26, dated June the 25th, 1841, making an aggregate of $7088.14.

To the account of November, 1839, are attached two credits, one of $1366, dated 27 August, 1840, and another of $661.43, of the date of 30 January, 1841,—to the two accounts of 1840 and 1841, is attached a credit of $243.

Complaint claims that the credits of $661, $1366 and $243, should be applied to the second acct of 1840, secured by the mortgage, and that there are other payments also applicable to it, to wit: $1652, paid by Thompson and Hagner; $1000 paid in bills of the Life Insurance and Union Bank, and $1000 in a draft by E. M. West and A. K. Allison for cotton.

The credits of $1366 and $661, it is said should be applied to the draft of $2723, or in other words be applied to the mortgage notes.

The reliance for this position is upon the alleged admission of defendants in their answer, "that the draft of $2723.49, was the amount in which West stood *indebted* for goods, furnished previous to that time." The inference drawn from this is that West owed at this time, 16 September, 1840, the sum of $2723.49, and nothing more.—We cannot consent to such construction. If the sentence stood alone and by itself unconnected with others, it might possibly admit this construction. In connection, however, with and in express reference to this very subject, the defendants give a copy of an account of previous

date, 13th November, 1839, in which there is an indebtedness of $2027.89, closed by these very payments. The accounts and these very credits then constitute as much a part of the answer as the expressions cited, and to construe them as contended for, would be to exclude a material and important part of their statement, and be doing the utmost violence to the clear and manifest intent of defendants, as declared in their answers. R. K. West had no such opinion. He is particularly questioned as to these items and this account, and says, "he does not know whether the charges are correct or not. The credits he knows are not. The payments therein credited, *are not the only payments ever made by me,* on account of my indebtedness to Wilson and Herr."

Here the objection is not to the credits made, but to the want of some which he thinks ought to have been made. It is not a little singular that if this account of 1839, showing indebtedness previous to the draft is excluded, there is no other evidence in the record as to their payment. We are of opinion then that there is no ground for contending that these items should be applied differently to what they have been by defendants.

The next sum claimed, is a payment by Thompson and Hagner to D. C. Wilson, made on the 7th and 10th days of August, 1840. The credit of $1366, bears date of the 20th August, predicated on a part note of the Union Bank, dated 10 of August, 1840, so that the inference seems a fair one, that these relate to the same transaction. There is no other money shown to have been received about that time. Had the whole sum of $1652 been credited, little doubt could remain. We, however, think it the same

saction, excepting that the entire sum received by on was not remitted. The sum of $286 not forward-) Wilson and Herr, nor credited in any other account, then form a just credit upon the acct. of $2723.49, at time the oldest account unsettled.

ıe next claim is a sum of $1000, paid 26 January, 18- hrough cotton of E. M. West, and a draft of A. K. Al- . There is no question as to this sum of money being ved by D. C. Wilson, the only question is whether it for his own individual account, or for the account of on and Herr. For anything appearing in the record, latter seems never to have had anything to do with transaction, nor to have been informed of it even.— on claims it as an individual transaction of his own, files a statement of the manner of its adjustment, ing the draft of Allison and the notes and account of irm with which it was paid. In a transaction of this , where a party was indebted to an agent in his in- lual right, jointly with a debt to another concern, ence would seem to require that the debtor would fy distinctly the debt to which payment should be e, that he should take a receipt and close the transac- by taking up the note or debt paid. Nothing of the takes place here. West does not even say that he ted the application of his payment to the Lunn notes,) the Wilson and Herr debt. His statement in his dep- on is "the notes given as collateral security have paid, $1000 in cash, and in the draft of Allison for 0 more." Again he says: "I did pay it, I paid it to uon, (the draft of $2723.49,) I gave Wilson an order on . Thompson for $, and the balance I paid in cur- money of the country."

Now, if there were nothing else in the case but thi statement of West, we should feel bound to disregard it i opposition to the denial of the answer. It is true this do not deny this payment in so many words, but makes a d nial as large as the allegation of the bill. The bill charg payment of the mortgage notes. The answer denies it.- But there is other evidence. E. M. West examined t complainant, in his deposition says: "in the early part 1842, I sold to D. C. Wilson cotton to the amount of $150 I drew an order on D. C. Wilson in favor of A. K. Allisor for the sum of $1000, with the understanding that Allisor was to transfer said draft back to said Wilson, for and c account of R. K. West." Questioned as to the applica tion of the payment he says: "The draft was to be ap plied *to the general account of R. K. West with said Wilso* or such was my impression."

Now, E. M. West seems to have been the chief and a tive agent in the transaction, and his evidence as to th application of the draft to a particular subject, is more t be relied upon and greatly preferred to a general alleg tion of another witness, that the note was paid. We ha remarked upon the importance of receipts being taken i a case of this kind, to identify the debt which the debt designed paying, for obviously in the present case if We paid Wilson $1000, without an agreement or direction t apply it to the debt of Wilson and Herr, Wilson woul have a right to apply it to a debt of his own; (as far a this case is concerned, we say he had a right to do it, f they do not claim the payment to themselves,) hence the n cessity of a receipt. R. K. West says, speaking of this pa ment, "he has no receipts in his possession." Yet, E. M

West in his deposition says: "I have seen receipts of D. C. Wilson to and in the possession of R. K. West. I have seen them within the last twelve months. I have no recollection of the amount of any of them. I don't know where they are at this time. They were receipts for so much money without *specifying on what account.*"

We find too in the record a receipt for $1000 in the Life In. & Trust Co. and Union Bank Bills, the subject of another claim, specially applicable to this draft. Under these facts we are fully justified in holding that this sum was paid, not to Wilson and Herr as claimed, but to the private and individual account of David C. Wilson, and that R. K. West had no receipt for it as a payment on the draft of $2723.49.

The claim of $1000 paid October, 1841, is sustained by the receipt of David C. Wilson, applying it to this draft and is not contested, although we are constrained to say the evidence is very strong that it was designed to be applied to the account of June 25, 1841. Daffin and E. M. West, in their depositions, both speak this way, and this was the decided impression of D. C. Wilson.

The item of $243 is put to both the accounts of 1840 and 1841. It will be allowed to the oldest account, the one secured by the mortgage notes.

The payments allowed on the draft of $2723.49, are $1000, October 23, 1841; $218 January 4, 1842, and $243 June, 1842. Giving credit for these with interest, and deducting this amount from the sum due on the draft with interest to the date of the judgment, and there remains the sum of sixteen hundred and seventy-one dollars due, which defendants Wilson and Herr, have the right

in equity to have paid before the interests of Hayward can intervene, according to the decision and opinion we have made. We are then of opinion that the complainant has not made out or sustained his position that the debt due and secured by the mortgage was paid and satisfied before the judgment of foreclosure was rendered.

The decree made herein on a former day of the term, will then stand and remain as the final decree of this court, and the petition of complainant will be dismissed.

FARISH CARTER, APPELLANT, VS. ARCHIBALD T. BENNETT, ROBERT MAY, W. G. DAVIS AND OTHERS, APPELLEES.

1. Where all the equities of the bill are denied by the answer, it is not of course to dissolve the injunction. The granting and continuing of injunctions rest in the discretion of the court, to be governed by the nature and circumstances of the case.

2. A judgment recovered in the State of Georgia, as to matters of evidence, is entitled to full faith and credit in this State, but the same faith and credit are not due to subsequent acts under it, such as issuing and returning of execution thereon, and until said judgment has been prosecuted in a court of this State, judgment recovered and execution issued and pursued to every available extent, the plaintiff is but a creditor at large.

3. The trusts intended by the Courts of Equity, not to be reached or affected

atute of limitations, are those technical and continuing trusts, which all cognizable at *law*, but fall within the proper, peculiar and exclu- sdiction of the Court of Equity.

swer of a defendant is only evidence as to facts, to which other testi- uld be received, and it will not be admitted to show that the intent and t of the parties to a written agreement was contrary to what appears face of it.

s should equitably construe lawful stipulations.

)n purchasing mortgaged or encumbered slaves at a very reduced price ' *to all the liabilities that are against them in the way of debt, eith-)te, judgment or mortgage, as the property of the mortgagor, the or only warranting the same as against himself and the heirs*" and the luction in the price being unexplained must be considered to have d only the equity of redemption therein. And as between the parties, f Equity will consider the justice, equity and understanding of the e to be, that any encumbrance in the way of debt, *then* existing a- ild slaves, either by *note, judgment* or *mortgage*, as the property vendor, were to be met and paid by the purchaser, to any amount not g the value of the slaves, at the time said liability shall be enforced; ı a purchase constitutes a constructive trust in rem in favor of the ' said encumbrances or any of them, such as Courts of Chancery only orce.

is nothing in the history of litigation between the parties as pre- ı the record, that should estopp the complainant from insisting upon st.

es where it is doubtful whether courts of law can give relief, Courts of y will entertain jurisdiction.

e promissory notes are offered in evidence and ruled out by the court, offered again, and where the mortgage given to secure said notes is red in evidence, but in consequence of said notes not being in evi- ıe said mortgage and assignment thereof, were not and could not en *fully considered and determined* by the Jury, and there were

other issues before the Jury, a judgment rendered under such circumstances should not be considered as final and conclusive adjudication in respect to said mortgage and the ownership of said mortgage.

10. A mortgage executed in Georgia on slaves and real estate then in Ga., and said slaves *subsequently* removed to Fla., and the equity of redemption therein sold at a reduced value, under an agreement that they are purchased "*subject to all the liabilities against them, in the way of debt either by note, judgment, or mortgage in the State of Georgia, as the property of the vendor or mortgagor, the vendor only warranting the same against himself and his* heirs," and afterward removed from the State, some by the party complainant, and some by the defendant, and there being equities tangible, such as the Court of Chancery may seize hold of *in rem* and *force* the return of said slaves within the jurisdiction of said court, or decree a personal liability, may be foreclosed in a Court of Chancery having jurisdiction in this State, on the slaves, as if they were in Florida within the jurisdiction of the court, without embracing the real estate or any other property in Georgia, included in said mortgage, and forming *no part* of said purchase; but any transaction or acts of the mortgagee or holder of the mortgage, in Georgia, which in equity and good conscience, under all the circumstances of the case, should be a set-off, or reduction, or credit on the indebtedness of the mortgage, will enure to the purchaser of the equity of redemption.

11. Bills for a new trial not countenanced, and never should be entertained except in a very clear case of fraud or injustice, or upon newly discovered evidence, which could not *possibly have been produced* at the first trial.

12. The statute regulating "commissions for collecting" between attorneys and clients, relates only to per centage for collecting. For *other* services at reasonable and adequate remuneration may be allowed, to be ascertained by proof and either and both of them constitute in this state, what is known and spoken of in this country and in England as "Fees" and "costs," between attorney and client, and constitutes a *lien*, which should be enforced under the same rules of law as in England, where those fees and costs are taxable so far as consistent with our practice.

13. The right of set-off prevails in general cases,so as to interfere with the solicitor's lien upon the debt recovered, but where *other claims* arising out of different transactions and which could not have been a legal or equitable set-off in that suit exist between the parties, the court will not divest the lien of the attorney or solicitor, which has already attached on the amount recovered for the costs of that particular litigation.

Appeal from the interlocutory order of the Circuit Court for Leon county sitting in Chancery.

Farish Carter filed his bill in the court below, alleging that on the 13th day of October, 1839, one Warren Jordan, of the State of Georgia, executed a deed of mortgage, covering certain lands in said State, and seventy-nine slaves, to the Georgia Railroad and Banking Company, to secure to said company the payment of certain notes given by said Jordan. That on the 31st day of May, 1842, the said Georgia Railroad and Banking Company, for a valuable consideration, assigned the said mortgage and the notes for which it was a security, to him Farish Carter. That he, said Carter, had recovered two several judgments against said Warren Jordan, in Georgia, one for $5000, and the other for $847.66, that shortly after the maturity of the notes secured by said mortgage, the said Carter being about to enforce his execution issued on said judgments, against said Warren Jordan, he, said Jordan, determined to remove the slaves embraced in said mortgage to the State of Texas, for the purpose of avoiding the payment of his debts, &c., that for this purpose said Jordan employed one Jeptha Harris, to take charge of said slaves and remove them to Texas, and he Harris, did in the night time receive said slaves and proceeded with them to Apalachicola in Fla. That soon after the arrival of said Harris at Apalachicola with said slaves, and before they could be embarked for

Texas, one John Watson of Columbus, Georgia, perceiving suspicious circumstances, instituted proceedings at random, in favor of said Georgia Railroad and Banking Company, and procured an attachment under which one Nathan Baker, Deputy Marshal, seized the said slaves, (except one who had been given for the transportation of the rest to Apalachicola.)

That said Harris being a stranger in Apalachicola, and greatly embarrassed by the unexpected seizure of said slaves, did by the advice of defendant Bennett, take the advice of counsel. That said Bennett was present at all consultations between said Harris and his counsel, and obtained the confidence of said Harris and a knowledge of all the circumstances connected with the removal of said slaves, and the object and purpose of such removal, and that said Harris was advised that his letter of attorney from said Warren Jordan, was insufficient to enable him to replevy the slaves or successfully make defence against said false attachment, and was also further advised to return to Georgia and obtain more ample authority. That said Bennett returned with said Harris to the plantation of Warren Jordan, in Georgia, and there found said Jordan and one Reuben Thornton, his father-in-law, to whom said Harris and said Bennett detailed the facts in respect to the seizure of the slaves. That Bennett manifested great interest in the execution of Jordan's purpose, offering his aid in replevying the property, and that under his advice, said Jordan executed a bill of sale of the said slaves to said Reuben Thornton, in the presence of said Bennett and said Harris as subscribing witness; but without any consideration whatever; but with the sole intent well known to

said Bennett, that said Thornton with the aid of said Bennett, and his friends might replevy the slaves for the benefit of Jordan, &c. That therefore said Thornton together with said Bennett and said Harris, returned to Apalachicola; but that the said Bennett instead of rendering the promised aid, threw every obstacle in the way to prevent their success in releasing the slaves, and influenced the Deputy Marshal to exact excessive and unusual bonds, which he well knew said Thornton could not give, and that said Bennett, when said Thornton despaired of success in regaining possession of said slaves, instituted a negotiation for the purchase of the whole of said slaves in the custody of the Deputy Marshal. That said Thornton failing to succeed in his and said Jordan's plans, and fearing the creditors of Jordan would soon pursue the property, sold all the slaves in custody of the Deputy Marshal to said Bennett and Robert J. Floyd, whom Bennett had associated with him in the purchase, for the sum of about $14,000, which was not one half of the value of said slaves, of which amount not more than $600.00 was paid at the time, and $2,000.00 since. That immediately after the sale by Thornton, the said Bennett and Floyd, obtained without difficulty the possession of all said slaves, by giving bond signed by themselves, and one security of nominal responsibility, and that a large number of said slaves were immediately removed from Apalachicola and sent out of Florida for the purpose of sale beyond the reach of the creditors of Jordan.

Carter further alleged in his bill that at the time of the execution of the bill of sale from Thornton to Bennett and Floyd, the latter delivered to Thornton an instrument un-

der their hands and seals, certifying that the said slaves were sold subject to all liabilities against them in the way of debt, either by note, judgment or mortgage, in the State of Georgia, either as the property of Warren Jordan or of Reuben Thornton, &c., and certifying also that if any of the property should be lost by suit in consequence of any claims as aforesaid, such loss should be no set-off or plea against the payment of a note given by Bennett and Floyd in part payment, &c.

The bill also alleged that shortly after the sale from Thornton to Bennett and Floyd, the Georgia Railroad and Banking Company, then holders of said mortgage and mortgage debt, instituted a proceeding in Franklin Superior Court for the foreclosure of said mortgage, making said Warren Jordan the only defendant, and sued out an attachment against said mortgage slaves for $5000.00, which was not one third the amount due on said mortgage notes, and that under said writ a part of said slaves were found in the possession of defendant Bennett, and one James Farrier, and a levy thereon was endorsed on said attachment. That after the assignment of the mortgage and mortgage debt to complainant, and on the 10 December, 1842, being then in Apalachicola and discovering that the attachment aforesaid was limited to the sum of $5000.00, filed an amended petition in said proceedings, setting forth the assignment aforesaid, and that a much larger sum was due on the mortgage than the sum sworn to, &c., that a new attachment was issued and levied upon thirty of said slaves, in possession of said Bennett and two of which were in the possession of Roberts, Allen & Co. That in the Superior Court of Florida then in session, complain-

rt Carter, by the consent of Reuben Thornton, who held letter of attorney from Warren Jordan, deemed sufficient or that purpose; obtained a judgment and decree of foreosure for $16,783.00. That an execution on said judgent was immediately awarded and a levy was made on he slaves attached; that said slaves so levied on were sold n the 31 day of December, 1842, and on the 9 day of Janury, 1843, and were bid in by R. H. Long for the benefit of omplainant.

The bill further alleged that previous to said sale, and on the 15 day of December, 1842, said Bennett instituted an action of Trover against complainant Carter, in Franklin Superior Court, for the recovery of said slaves, sold as aforesaid, and that Roberts, Allen & Company, instituted a like action for the recovery of the two slaves levied on while in their possession. That in December, 1848, the said action of Trover instituted by Bennett, came on for trial before the Circuit Court for Franklin county, and that at said trial said Bennett claimed title under his actual possession at the time of levy, and through the bill of sale from Thornton, and that complainant Carter defended under the judgment of foreclosure aforesaid and the sale thereunder, but to his surprise said judgment and sale did not avail him as a legal defence, by reason of the fact that Bennett and others in possession of said slaves, were not made parties defendants in said proceedings, and by reason of a want of sufficient notice to Jordan, and by reason of the want of sufficient authority in Reuben Thornton to give the various consents he attempted to give in behalf of Jordan. That notwithstanding sixteen of said slaves had been retaken by Bennett, as hereinafter stated,

a verdict was rendered in favor of Bennett, and judgement given thereon for $19,999.66.

That an application for a new trial was made on the ground among others, that the verdict and damages were against the evidence, but that said application was refused among other things, because the said court deemed it had no authority in law to grant a new trial, on the ground that the verdict was against evidence, and that on appeal the Supreme Court decided it had no power to correct the errors of the Circuit Judge in refusing to grant a new trial. That in like manner and at the same term of the Court the said Roberts, Allen & Co., recovered a judgment in the action instituted by them for $1075.00. That since the rendition of this judgment, complainant has for the first time been informed, that the suit in favor of Roberts, Allen & Co., was prosecuted by Bennett for his own use, and that said recovery is in fact the recovery of Bennett for slaves, which he had long before the trial retaken by force and disposed of.

The bill further alleges, that pending the said suits at law, the slaves purchased by complainant, were removed to the plantation of R. H. Long, in Jackson County, Florida, to abide the result of said proceedings, and that on or about the 17th day of April, 1843, the said Bennett by force did enter upon the premises of said Long, and seized and carried away sixteen of said slaves, and also the slaves sued for in the action in favor of Roberts, Allen & Co., which slaves said Bennett disposed of for his own use. That subsequently complainant Carter instituted an action of Trover against said Bennett, for the conversion of said sixteen slaves in Georgia, where process was served on said Bennett, and in said suit he, complainant, recovered judg-

ment for $3850.00, principal, and $1310.38-100 for damages and hires. That no part of said judgment being paid, complainant instituted an action on said judgment in the United States District Court for the Northern District of Florida, and that afterwards on the 17 day of February, 1852, complainant recovered judgment therein against said Bennett for $7261.59-100 and that execution hath been issued thereon, returned no property found.

The bill further alleges that by reason of the irregularities in the pleadings and proceedings in the suit for the foreclosure of the mortgage as aforesaid, which did not reach or effect the merits of said mortgage, or the mortgage debt, or the equities of complainant; he could not defend himself in a court of law by setting up his equities as assignee of the mortgage debt as his equities as judgment creditors of Warren Jordan, and that his said claims were not considered or allowed in said proceedings at law.

The bill further alleges that both Reuben Thornton and Warren Jordan, died insolvent in the State of Tennessee, in the year 1843, and at the removal of said slaves from Georgia, neither of them had any means or property accessible to complainant, which could be applied in payment of said mortgage debt or of said judgment, except the property other than the slaves embraced in the mortgage and that all said property has been exhausted either by the application of the proceeds to the said deed of mortgage, or to older and superior liens, except about 920 acres of land in Georgia, which as yet remains unsold, and for which two dollars per acre cannot be had. And further, that he is unable to obtain satisfaction of his judgment aforesaid from said Bennett, that said Bennett

has for a long time been embarrassed, and that shortly after the recovery against him, he removed to the State of Louisiana. That the slaves aforesaid cannot be found, and that they have been removed and scattered beyond the reach of complainant's claims.

The bill further alleges that defendants Semmes, Baltzell and Davis, claim to be interested in said recoveries at law in favor of Bennett and of Roberts, Allen & Co., and that they severally have a lien as attorneys upon the proceeds of said judgment, paramount to all the equities of complainant, for compensation, and fees for alleged services rendered by them as attorneys for the plaintiff in said judgments, and have noticed complainant of the sums claimed by them severally, which in the aggregate exceed the sum of ten thousand dollars, all which complainant charges to be against equity, &c.

The bill also alleges that the judgment in favor of Bennett, has been assigned by him to Robert May, but charges that such assignment is fictitious and colorable, and intended to defeat the equities of complainant, &c.

The prayer of the bill for injunction and relief is set out in the opening of the opinion of the court.

Among the other exhibits filed with the said bill of complainant is the following, viz:

TERRITORY OF FLORIDA, }
Franklin County. }

Whereas, Reuben Thornton of the county of Hall, in the State of Georgia, has this day sold R. J. Floyd, and A. T. Bennett the following negroes which are now in the possession of the Marshal under an attachment sued out against one J. L. Hodges, to wit: (naming them—seventy-eight in

number, which said negroes are sold by the said Thornton to us and said R. J. Floyd and A. T. Bennett, subject to all the liabilities that are against them in the way of debts, either by note, judgment or mortgage in the State of Georgia, either as the property of Warren Jordan or the said Reuben Thornton, the said Reuben Thornton only warranting the same against himself and his heirs. This is therefore given by us to show that if any of said property should be lost by suit in consequence of any claims as aforesaid, that it is to be no off-set or plea against the payment of the notes of seven thousand dollars, bearing even date with these presents, given by said Bennett and Floyd in payment for said negroes, as witness our hands and seals this 16th March, 1842.

R. J. FLOYD, [seal.]
A. T. BENNETT [seal.]

Signed, sealed and delivered in presence
J. C. HARRIS,
J. M. TENGUE,

The complainant also annexed to his bill copy of a plea sworn to by A. T. Bennett, on the 24th July, 1844, in a certain case instituted by Charles T. Thornton, against him on the note for $7000.00, given by him and Floyd to Reuben Thornton, in which he alleged that the note aforesaid "was made and executed in consideration and payment of certain negro slaves, sold to defendant on the 16th day of March, 1842, "that said slaves being the property of one Warren Jordan, in the State of Georgia, were fraudently, clandestinely, covinously, collusively, wickedly, illegally and improperly against the laws of said State run off removed and carried away from said State by said Jordan

and Reuben Thornton, said removal being made, executed, contrived and devised of fraud, covin, collusion and guile, to convey them from said State, out of and beyond the United States to Texas, to the end, purpose and intent to convert them to their own use and profit and to delay, hinder and defraud the Georgia Railroad and Banking Company and others to whom said slaves had been mortgaged and their creditors in said State of Georgia, contrary to the laws of said State; that the sale to said defendant, (Bennett,) by the said Thornton and the giving and taking of said note of $7000.00, and its assignment to plaintiff was in pursuance and consummation of the same wicked, fraudulent, corrupt, illegal, covinious and improper design contrivance and purpose," &c.

On motion in behalf of complainant Farish Carter, and after argument of the counsel for the parties, an injunction was awarded enjoining and restraining all proceedings upon the judgments and executions mentioned in the bill of complainant, in favor of A. T. Bennett and Roberts, Allen & Co.

The defendant, A. T. Bennett, alleges in his answer that the court has no jurisdiction over so much of the matter of said bill as relates to the judgment asserted by complainant, to be held by him against Warren Jordan in the State of Georgia, because he says that said complainant has never obtained judgment in this State upon said judgment, and had execution issued thereon and a return of no property.

He further alleges 'that the facts in said complainant's bill set forth as to the nature and character of said conveyance of said slaves by said Jordan to said Reuben Thornton, and

by said Thornton to this defendant, (Bennett,) were fully known to said complainant, (Carter) in the year 1842, and more than five years before the bringing of this suit,—and that the rendition of said judgment, as is by said complainant asserted occurred more than five years before the bringing of this suit, to wit: in the year 1842, and that the possession of said negro slaves by this defendant, (Bennett,) and his acts of ownership over the same, and said suit at law against said complainant for the seizure of said slaves, began more than five years before the bringing of this suit, to wit: in the year 1842, and have continued without any cessation or interruption up to this time, and that therefore the right by said complainant in his said bill asserted as a judgment creditor of said Jordan, against defendant, (Bennett,) as the purchaser and owner of said negro slaves, or a judgment recovered for the conversion thereof, began and existed if at all, more than five years before the bringing of this suit, and that the failure of the complainant to institute suit thereon has not arisen from any act of this defendant, nor been prevented by any legal disability of said complainant, but that such delay and lapse of time has arisen from the laches and fault of said complainant, all of which this defendant, (Bennett,) insists is a *bar* to the *discovery* and *relief* so prayed.

Defendant further in his answer *denies* he became liable as the trustee for said Carter as charged in said bill, and if such was the fact, because he says therein, that so far back as the year 1842, he asserted adverse title and possession to said negroes so purchased by him against the said complainant, of all which said complainant had notice at the time aforesaid, and has maintained the same up

to the present time, that *by reason of said fact* and said lapse of time, that said complainant is and should be barred from any and all relief sought for by said bill *by reason of said alleged trust.*

Bennett also in his answer says that to so much of said bill as seeks relief against the suits now pending in Franklin Circuit Court, in favor of this defendant against said complainant, said Court of Equity had no jurisdiction over said suits by reason of the fact, that if the matters alleged in said bill be true, it is competent for said complainant to plead to said suits a former recovery, and that said complainant has a *full and complete remedy at law* to said suits.

He also says that all and singular, the matters in relation to the claim by said Carter in his said bill set forth in respect to any mortgage of said slaves, sued for in said action of Trover, and as to the ownership by said Carter of the debt in said mortgage provided to be paid, *were* in said action of Trover *fully considered and determined,* and this defendant (Bennett) relies on the said judgment rendered in said action as a *conclusive* and *final* adjudication of said matters, and craves the benefit hereof as a *final settlement thereof,* and insists upon the same as a complete answer to so much of complainant's bill as seeks from said defendant any discovery in relation to said mortgage, or the *ownership of said mortgage* debt by said Carter, and in *bar* of the relief in respect to said asserted *mortgage* and *mortgage* debt, which said Carter asks in his said bill.

He also says that the said finding of said jury, and said judgment of said court in said action of Trover should be *deemed* and *held* to be *final* and *conclusive* upon said

questions, relating to any mortgage of said slaves, because such matter was a proper subject matter of defence, capable of being presented by said Carter on the trial of said action and capable of being considered by said jury or court in mitigation of damages, and that even if it was true that said matters were not presented to said jury by said Carter, and by them were not considered, yet that such failure, if it had occurred, was the fault of said Carter, and that it is contrary to equity and grossly vexatious on the part of said Carter to seek to renew the litigation in respect to said alleged mortgage, by said Carter now again in his said bill set up, after the *same matters have been fully* heard, and after said Carter attempted to prove said matters on the trial of said action of Trover, and that it is contrary to equity and the rules of equity proceedings and beyond the power and jurisdiction of said court of equity to re-examine and decide in this proceeding the said matters so before fairly tried and decided in said suit at law, or in any wise to re-investigate the matters of fact which might and should have been litigated in said action at law.

He also says that if the allegations in said Carter's bill be true, that said facts as to said mortgage and the rights of said Carter in respect thereof, *were not fully tried and decided* in said action of Trover, yet, this defendant (Bennett) insists that the conduct of said Carter in keeping back his asserted equitable claim, and obstinately litigating with defendant in a court of law, at a ruinous cost to defendant, whilst as said Carter now asserts, said court had no jurisdiction to administer complete relief, *does not entitle* the said complainant to the aid of this court; but on

the contrary imperiously requires, that by refusal to grant this relief asked, a just rebuke should be administered to conduct so litigious and oppressive in its character.

Bennett in his said answer also denies the statements in said bill, as to the ground of the refusal of the judge who tried said suit in Trover between said Bennett and Carter, to grant a new trial therein.

He also denies the allegations as to the character of the verdict of said jury, and all the charges of gross error in said verdict, and insists that the complainant is not entitled again to re-examine the same matters, but that such decision thereof *is conclusive upon said complainant.*

He also denies that said judgment in the foreclosure suit against Warren Jordan, failed said Carter as a defence, on the trial of said suit in Trover, between said Carter and Bennett, because of *mere accidental irregularities or mistakes over which he, said Carter had no control, and as to which he could not judge.*

He also denies that the failure of said Carter to obtain the benefit of his said proceedings in said suit of foreclosure against Warren Jordan, and the causes of said failure were of a kind not to impair any claim which said Carter might have to the aid of a Court of Equity, as is sought to be shown by said Carter by the statement made in his said bill, on the contrary this defendant insists that the acts of said Carter in respect to the said proceedings in said foreclosure suit, *do* and should seriously impair any such claim, if any he has, and that said proceedings in said foreclosure suit and said Superior (now Circuit) Court of Franklin County, against said Warren Jordan, and the acts of said Carter in connection with the same *are a bar to the relief asked* by said Carter.

He also *denies* the allegation contained in said bill of complaint charging him with fraudulent conduct in the purchase of said slaves and with the intent as alleged of defrauding the Georgia Rail Road Banking Company, and the creditors of Warren Jordan, and insists that the same were passed upon by the jury in the Trover suit of Carter and Bennett, and that the judgment rendered in said cause is and should be *final* and *conclusive.*

He also denies, that said judgment of Roberts, Allen & Co. was obtained as alleged in said bill, upon "like evidence," and because said judgment *is a bar* to the relief prayed for by said complainant in reference to said judgment.

He also asserts that the lien of said defendants Davis and Semmes, for fees upon the recovery of said judgment in Bennett vs. Carter, in Trover are superior to any of the equities set up in the bill of complaint.

He further states, that previous to said sale to this defendant and Floyd, the said Thornton informed this defendant, that a portion of the said slaves were under mortgage in the State of Gergia to the Central Bank of that State, for something under Five Thousand Dollars. That there was no other *valid claim* against the slaves, and that there was sufficient property in the State of Georgia to pay off said incumbrance. Defendant was informed afterwards but did not know of the sale, that said Thornton had informed said Floyd that the mortgage debt was nine thousand dollars or thereabouts.

He further says that the *day after* the execution of said bill of sale and the delivery of said slaves, the instrument in writing referred to in said bill as exhibit F. was presented to the defendant to sign. That said Floyd had previously

(the same day) signed it, and it was then and there represented to this defendant that the sole purpose and object of said instrument, was to prevent said Floyd and this defendant from pleading any recovery of said negroes by virtue of any *claims* from the State of Georgia as a set off to the said joint note of $7000. And it was with this purpose and none other that this defendant was induced to sign said instrument. This defendant then believing that there was no *valid claim* against said property, *other than that stated by said Thornton,* and previously referred to. And he denies that the object of said instrument was as stated in said bill, but on the contrary it formed no part or condition of said sale further than before stated: That though said instrument bears date on the day of said bill of sale, yet in point of fact, it was drawn up and executed on the next day thereafter.

That said bill of sale was a full and absolute conveyance without condition whereas said instrument was upon a separate piece of paper, and designed as a private memorandum for the protection of said Thornton's interest.

The record in the Trover suit instituted by Bennett vs. Carter referred to in the bill and answer was considered and admitted as evidence in this case, which embraced the testimony given by R. J. Floyd in that case, who stated that "Thornton at the time of sale, told me there was a mortgage upon certain land and a portion of the negroes for some nine thousand dollars. He gave me a list of the negroes that he said were not mortgaged. The most of these negroes I got by his advice. After the suit was com-

menced I found that many of the negroes were mortgaged that he gave me a list of those as not being mortgaged. We did remove the negroes immediately from the jail to the schooner and got a steamer to tow us in the bay—we put them on Schooner Magnet—divided them at sea. I sold nine, Farrier disposed of his, or has them now, and the Marshal sold Bennett's. We put them on the Schooner to send them where they might be divided without being molested by the Georgia debt of nine thousand dollars. I was with the negroes. Bennett and Farrier were both there? the officers of the schooner and steamer that towed the schooner down, were there and possibly some passengers on the steamer."

A. G. Semmes and W. G. M. Davis who were made defendants, severally answered that they were engaged as attorneys in the prosecution of said Trover suit of Bennett against Carter and severally claim that they have a lien for their fees upon the judgment rendered therein, superior to the alleged equities of complainant and should be allowed the same out of said recovery. A. G. Semmes, Esq. claims that for his services in said suit he is entitled to the sum of $5000.00 and W. G. M. Davis, Esq. states that by contract and agreement with Bennett, he was to receive $2,500.00, for his services in the Supreme and Circuit Courts of the State, and the further sum of $1,200.00, for his services in the Supreme Court of the U. S.

Robert May likewise answered, stating that he held an assignment of the judgment rendered in the Trover case, as collateral security.

On the coming in of the answer of Bennett the court below on motion in his behalf dissolved the injunction which

had previously been awarded, and the complainant Carter prayed an appeal to the Supreme Court.

James T. Archer and *R. J. Moses* for appellant.

W. G. M. Davis and *A. G. Semmes,* for appellees.

HON. W. A. FORWARD, Judge of the Eastern Circuit, (who presided in the case in lieu of BALTZELL, C. J— disqualified) delivered the opinion of the court.

The bill was filed to cancel a bill of sale from one Reuben Thornton to said Bennett and Floyd, and to require the defendants Bennett, Floyd and Roberts, Allen & Co., to release all right, title, interest or claim under said bill of sale, in and to said slaves therein mentioned, as against the said Farish Carter, also to set aside a judgment at law in an action of Trover in the Circuit Court of Franklin Co., in this State,wherein the said Bennett was plaintiff and said Farish Carter was defendant, for the conversion of some of the negroes mentioned in said bill of sale. And also in another action therein, between Roberts, Allen & Co., plaintiffs, and said Farish Carter, defendant, (and which is alleged to be the property of said Bennett,) for the conversion of other of said negroes which were of said Jordan and Thornton; and that they be required to release, cancel or discharge the same, or that they be perpetually enjoined from the collection thereof, or if the said judgment be not decreed to be cancelled as against equity and good conscience, that the said judgments be allowed to be paid extinguished and set-off on a mortgage of one Warren Jordan, to the Georgia Railroad and Banking Company, assigned to the said Farish Carter, embracing the said slaves in said bill of sale of Thornton to Bennett, (as well as other property real and personal,) and on another claim which the said Carter has as judgment creditor of said Jordan.

And that said defendants be enjoined from further proceeding in the prosecution or institution of any suits at law against said Carter, until the final decree in this cause.

And that said defendants Bennett and Floyd be required to produce the slaves received of said Thornton, under and by virtue of said bill of sale, and which have not been sold under execution upon a judgment of foreclosure of said mortgage upon a petition filed on the common law side of the Superior Court of Franklin county, by the said Georgia Railroad and Banking Company,) for the use of said Carter against Warren Jordan.

And that as to the said last mentioned negroes, the said mortgage be foreclosed, and that said Bennett and Floyd and all persons claiming under them, be barred of and from all equity of redemption therein under said deed of mortgage, held by said Carter as such assignee, and that said slaves when produced be sold to pay the balance due on said mortgage debt, that said Farish Carter be allowed to credit upon said mortgage, at a fair and just valuation, the slaves sold and retained by said Carter, on the said judgment of foreclosure in said Superior Court, and which were not recaptured by said Bennett; and also the balance due said Carter on his said judgment in Georgia against said Jordan and that if such sales prove insufficient, that the balance be decreed to be paid by said defendants, Bennett and Floyd, or if the said slaves cannot or will not be delivered up to abide the decree of said Court of Equity, that said Bennett and Floyd be decreed to pay the whole amount due to said Carter on said deed of mortgage, and judgment against said Jordan in Georgia, (*as it is contended*

in said bill they agreed to do by their agreement with said Reuben Thornton at the time of their purchase.) And that the said pretended assignment of said judgment in Trover against said Carter, to said Reuben May by said Bennett, he declared null and void as against said Carter; and that the said pretended liens on said judgment in Trover for fees set up by defendants, Semmes, Baltzell and Davis, attorneys for said Bennett, be decreed to be contrary to equity; and that they be disallowed, or if any part of their said demands be allowed, that an account be taken thereof and the same adjusted upon proof. And a general prayer for other and further relief.

An injunction, after argument, was granted in the Circuit Court, and upon the coming in of the answer of the defendant (Bennett,) said injunction on motion of Solicitor, and without further argument, was ordered to be dissolved.

From which order (as provided by act of 7th January, 1853,) an appeal has been taken to this court.

The first question that presents itself is the practice of Courts of Equity in dissolving or retaining injunctions, upon the coming in of the answer of defendant.

We believe it to be the almost universal practice, that if the answer fully denies *all the circumstances* upon which the *equity is founded,* credit is given to the answer and the injunction dissolved. This practice, however, is not without exceptions. Chancellor Kent in Roberts vs. Anderson, 2 John, Ch, R., says: "that even where all the equity of the bill is denied by the answer, it is not of course to dissolve the injunction; as the granting and continuing an injunction rests always in the sound discretion of the court *to be governed by the nature of the case.*"

The complainant by his solicitor contends that the chancellor erred in dissolving the injunction, because there is sufficient equity disclosed by the answer to have induced the court to continue it until the hearing; and also because the equity of the bill upon which the injunction rests, is not denied by the defendant.

The defendant insists that the injunction should be dissolved, because the said Bennett in his answer says:

I. The Court of Equity of this State has no jurisdiction over *part* of the matters alleged in said bill, to wit: "So much thereof as relates to the judgment, asserted by complainant to be held by him against Warren Jordan in the State of Georgia, because he says that said complainant has never obtained judgment in this State upon said judgment, and had executed issue thereon, and a return of no property.

II. Because as to *other parts* thereof, the said Bennett in his answer states "that the facts in said complainant's bill, set forth as to the nature and character of said conveyance of said slaves by said Jordan to said Reuben Thornton, and by said Thornton to this defendant, (Bennett,) were fully known to said complainant, (Carter,) in the year 1842, and more than five years before the bringing of this suit. And that the rendition of said judgment, as is by said complainant asserted, occurred more than five years before the bringing of this suit, to wit: in the year 1842, and that the possession of said negro slaves by this defendant, (Bennett,) and his acts, and ownership over the same, and said suit at law against said complainant for the seizure of said slaves, began more than five years before the bringing of this suit, to wit: in the year 1842, and

have continued without any cessation or interruption up to this time, and that therefore the right of said complainant in his said bill asserted, as a judgment creditor of said Jordan, against this defendant (Bennett,) as the purchaser and owner of said negro slaves, or a judgment recovered for the conversion thereof, began and existed, it at all, more than five years before the bringing of this suit, and that the failure of the complainant to institute suit thereon, has not arisen from any act of this defendant, nor been prevented by any legal disability of said complainant, but that such delay and lapse of time has arisen from the laches and fault of said complainant, all of which this defendant (Bennett) insists is a bar to the discovery and relief so prayed."

III. Because the said Bennett in his answer denies that be became liable as the trustees of the said Carter, as charged in said bill, and if such was the fact, because he says therein, that so far back as the year 1842, he asserted adverse title and possession to said negroes so purchased by him, against the said complainant, of all which the said complainant had notice at the time aforesaid, and has maintained the same up to the present time, *that by reason of said facts* and said lapse of time, that said complainant is and should be barred from any and all relief sought for by said bill by *reason of said alleged trust.*

VI. Because the said Bennett in his said answer says that to so much of said bill as seeks relief against the suits now pending in Franklin Circuit Court, in favor of this defendant against said complainant, said Court of Equity had no jurisdiction over said suits by reason of the fact, that if the matters alleged in said bill be true, it is

competent for said complainant to plead to said suits a former recovery. and that said complainant has a *full and complete remedy at law* to said suits.

V. Because the said Bennett in his answer says that all and singular the matters in relation to the claim by said Carter in his said bill, set forth in respect to any mortgage of said slaves, sued for in said action of Trover, and as to the ownership by said Carter of the debt in said mortgage provided to be paid, *were in* said action of Trover *fully considered and determined,* and this defendant (Bennett) relies on the said judgment rendered in said action, as a *conclusive and final* adjudication of said matters, and craves the benefit thereof as a *final settlement thereof,* and insists upon the same as a complete answer to so much of complainant's bill as seeks from said defendant any discovery in relation to said mortgage *or the ownership of said mortgage* debt by said Carter in *bar* of the relief in respect to said asserted *mortgage* and *mortgage* debt, which said Carter asks in his said bill.

VI. Because the said Bennett in his said answer says, that the said finding of said jury, and said judgment of said court in said action of Trover, should be *deemed* and *held* to be *final* and *conclusive* upon said questions relating to any mortgage of said slaves, because such matter was a proper subject matter of defense, capable of being presented by said Carter on the trial of said action, and capable of being considered by said jury and court in mitigation of damages and that even if it were true that said matters were not presented to said jury by said Carter, and by them were not considered, yet that such failure, if it had occurred, was the fault of said Carter, and that it is contrary to

equity and grossly vexatious on the part of said Carter, to seek to renew the litigation in respect to said alleged mortgage by said Carter, now again in his said bill set up after the *same matters have been fully heard,* and after said Carter attempted to prove said matters on the trial of said action of Trover. And that it is contrary to equity and the rules of equity proceedings, and beyond the power and jurisdiction of said Court of Equity to re-examine and decide in this proceedings the said matters so before fairly tried and decided in said suit at law, or in any wise to re-investigate the matters of fact which might and should have *been* litigated in said action at law.

VII. Because he says Bennett in his answer says, that if the allegations in said Carter's bill be true, that said facts as to said mortgage and the rights of said Carter in respect thereof, *were not fully tried and decided* in said action of Trover, yet this defendant (Bennett) insists that the conduct of said Carter in keeping back his asserted equitable claim and obstinately litigating with defendant in a court of law at a ruinous cost to defendant, whilst as said Carter now asserts, said Court had no jurisdiction to administer complete relief, does not entitle said complainant to the aid of this court, but on the contrary imperiously requires that by refusal to grant this relief asked, a just rebuke should be administered to conduct so litigious and oppressive in its character.

VIII. Because said Bennett in his said answer, denies the statements in said bill as to the grounds of the refusal of the judge who tried said suit in Trover, between said Bennett and Carter.

IX. Because said Bennett in his said answer denies

allegations as to the character of the verdict of said
and all the charges of gross error in said verdict, and
sts that the complainant is not entitled again to re-ex-
ne the same matters, but that such decision thereof is
clusive upon said complainant.

. Because said Bennett in his said answer denies that
judgment in the foreclosure suit against Warren Jor-
failed said Carter as a defence on the trial of said suit
Trover, between said Carter and Bennett, *because of*
e accidental irregularities or mistakes over which he said
ter had no control, and as to which he could not judge.

XI. Because said Bennett in his said answer denies that
failure of said Carter to obtain the benefit of his said
ceedings in his said suit of foreclosure against Warren
dan, and the causes of said failure were of a kind not to
air any claim which said Carter might have to the aid
a Court of Equity, as is sought to be shown by said
ter by the statements made in his said bill, on the con-
ry, this defendant insists that the acts of said Carter in
ect to the said proceedings in said foreclosure suit, *do*
l should seriously impair any such claim, if any he has,
l that the said proceedings in said foreclosure suit in
l Superior (now Circuit Court of Franklin county, a-
nst said Warren Jordan, and *the acts* of said Carter in
nection with the same, *are in bar to the relief* asked by
l Carter.

XII. Because the said Bennett in his said answer *denies*
allegations contained in said bill of complaint, charging
n with fraudulent conduct in the purchase of said slaves,
l with the intent as alleged, of defrauding the Georgia
ilroad and Banking Company, and the creditors of War-

ren Jordan, and insists that the same were passed upon by the Jury in the Trover suit of Carter and Bennett, and that the judgment rendered in said cause is and should be *final* and *conclusive.*

XIII. Because the said Bennett in his said answer, denies that said judgment of Roberts, Allen & Co., was obtained as alleged in said bill, upon "like evidence," and because said judgment is *a bar* to the relief prayed for by the complainant in reference to said judgment.

Lastly. That the lien of said defendants, Davis and Semmes, for fees upon the recovery of said judgment in Bennett vs. Carter, in Trover, are superior to any of the equities set up in bill of complaint.

In determining whether the injunction shall be continued, it is necessary to examine whether the prayer of the bill in any of its aspects may be granted at the final hearing, for this purpose we take up the reasons urged by said defendants in the order presented.

To the 1st. objection. We say did the bill contain nothing but the claim set up under this judgment in Georgia, and the complainant thereby seeks to interfere with the frauds of the original debtor, (Jordan) then the position assumed in this respect would be fatal, for until judgment has been recovered thereon, and execution sued out, and pursued to every *available extent,* he is but a creditor at large.

It is true the constitution of the United States provides that as to *matters of evidence* it shall be entitled to full faith and credit (and that credit is considered due to judgments of courts of sister States in Florida,) but we cannot hold that the like faith and credit, should be given, to sub-

sequent acts under said judgment, such as issuing and returning of execution thereon in another State.

There are however *other* matters set forth in said bill, which we think as hereinafter stated, gives the said Court of Chancery jurisdiction in this cause, and as this judgment forms a part of the transactions, and is the property of the complainant who has submitted himself to the jurisdiction of said court, and seeks justice therein, it may therefore be properly acted upon, the court of chancery having jurisdiction for one purpose will retain the bill as to all other matters necessary, to the attainment of justice between the parties, and arising out of the subject matters.

Holding these views on this point, it is deemed unnecessary to determine the various questions of remedy for recovery of claims of an equitable nature, by one non resident against another, so ably presented by the solicitors on both sides.

To the 2d objection. We do not think it necessary to decide in this cause, whether judgments of courts of another State should be considered as simple contract debts or not, and under the operation of the *lex fori* as to the statute of limitations because there are sufficient circumstances and facts alleged in said bill, which (if found true) will bring the case within the well known rules of equity, taking it out of the operation of the act. Besides (as will be hereinafter seen) we hold that said mortgage assigned to said Farish Carter, can be foreclosed in said Court of Chancery, under the bill in this cause, and that in said "Exhibit F." declared to be the agreement of said Bennett and Floyd, with said Thornton, of the terms of purchase, a *trust* is created for the payment of said mortgage and debts.

In Kane vs. Bloodgood 7 John Ch. R. 111. Chancellor Kent lays down as law, "That the trusts intended by the Courts of Equity, not to be reached or affected by the statute of limitations, are those technical and continuing trusts which are not at all cognizable at *law* but fall within the proper, peculiar, and exclusive jurisdiction of this court." See also Bond vs. Hopkins, 1 Schoales and Lefroy 428. And this ruling seems perfectly harmonious with the judgment in Beckford and others vs. Wade 17 Vesey 97, cited by Mr. Davis, one of the Solicitors for Defendants.

It is contended by Judge Semmes of counsel for defendants, that said Bennett has held possession of these slaves *adversely* to Carter since the date of his purchase in '42, and Carter's rights (if any) are barred by the statute of limitations. We have already seen that if this agreement, setting forth the terms of purchase, between Bennett and Floyd and Thornton is established, and the claims of Carter not barred at the time of the execution, then, the Court of Chancery has *peculiar* and *exclusive* jurisdiction. If it were not so the bill, exhibits, and answer, present anything but possession *adversely* to Carter,—in other words, adverse possession, according to the legal requirements thereof.

To the 3d objection. The said Bennett denies that he became liable as the trustee for said Carter as charged in said bill. It is contended in said bill that Bennett and Floyd, thus became liable under an agreement setting forth the terms of the purchase, which said agreement is in the following words:

TERRITORY OF FLORIDA,
Franklin County.

Whereas, Reuben Thornton of the county of Hall, in the State of Ga., has this day sold R. J. Floyd and A. T. Bennett the following negroes which are now in the hands and possession of the Marshal under an attachment sued out against one J. L. Hodges, to wit: (naming negroes, seventy-eight in number,) which said negroes are sold by the said Thornton to us the said R. J. Floyd and A. T. Bennett, subject to all the liabilities that are against them in the way of debts, either by note, judgment or mortgage in the State of Georgia, either as the property of Warren Jordan or the said Reuben Thornton, the said Reuben Thornton only warranting the same against himself and his heirs. This is therefore given by us to show that if any of said property should be lost by suit in consequence of any claims as aforesaid, that it is to be no set-off or plea against the payment of the note of seven thousand dollars, bearing even date with these presents, given by said Bennett and Floyd in payment for said negroes, as witness our hands and seals this 16th March, 1842.

R. J. FLOYD, [SEAL.]
A. T. BENNETT, [SEAL.]

Signed, sealed and delivered in presence of
J. C. HARRIS,
J. M. TENGUE.

When we take into consideration the whole facts of this case as disclosed by the record in the Trover suit, there cannot be a doubt but that both Bennett and Floyd, at the time of the purchase were conversant of the fact, that there were liabilities beyond the mortgage, of said Jordan and Thornton in Georgia. At any rate they were sufficiently advised to put them on their guard. They certainly knew

that *five* days before their purchase, Warren Jordan sold these same negroes (with four others) making in all 79, to said Reuben Thornton, for $30,000 *cash down*—the bill of sale of which, was witnessed by the said Bennett in Georgia, where he had gone at the request of said Thornton on business connected with the same slaves.

Knowing this they purchased 65 of said negroes for $14,000—and partly on credit. Now why this *reduced price?* It is not explained by Mr. Bennett in his answer? Is it not the natural conclusion that the amount due on the mortgage on said slaves and Carter's judgment in Georgia then recovered and a *lien* upon them form a part of the consideration they were to pay? What did they mean when they declared under their hand and seal, that they bought said negroes subject to all the liabilities that are against them in the way of debt, either by note, judgment or mortgage in the State of Georgia, either as the property of Warren Jordan or the said Reuben Thornton? Mr. Bennett in his answer to the bill of complaint, states: "That previous to said sale to this defendant and Floyd, the said Thornton informed this defendant, that a portion of said slaves were under mortgage in the State of Georgia, to the Central Bank of that State, for something under five thousand dollars, that there was no other VALID CLAIM against the slaves, and that there was sufficient property in the State of Georgia to pay off said incumbrance. Defendant was informed afterwards, but did not know at the sale that said Thornton had informed said Floyd that the mortgage debt was nine thousand dollars or thereabouts."

"This defendant further says that the day after the execution of said bill of sale, and the delivery of said sla

the instrument of writing referred to in said bill as exhibit "F." was presented to the defendant to sign, that said Floyd had previously (the same day) signed it, and it was then and there represented to this defendant that the sole object and purpose of said instrument, was to prevent said Floyd and this defendant from pleading any recovery of said negroes by virtue of any CLAIMS from the State of Georgia as a set-off to the said joint note of 7,000 dollars. And it was with this purpose and none other that this defendant was induced to sign said instrument. This defendant then believing that there was no *valid claims* against said property, other than that stated by said Thornton and previously referred to."

This defendant denies that the object of said instrument was as stated in said bill, but on the contrary it formed no part or condition of said sale further than before stated; that though said instrument bears date on the day of said bill of sale, yet in point of fact, it was drawn up and executed on the next day thereafter."

"That said bill of sale was a full and absolute conveyance without condition—whereas said instrument was on a separate piece of paper and designed as a private memorandum for the protection of said Thornton's interests."

Mr. Floyd says—see his testimony in record of Bennett vs. Carter, Trover suit, p. 7. *"Thornton at the time of sale, told me there was a mortgage upon certain land, and a portion of the negroes for some nine thousand dollars."* He gave me a list of negroes, that he said was not mortgaged. The most of these negroes I got by his advice. After suit was commenced, I found that many of the negroes were mortgaged, that he gave me a list of, as not being mort-

gaged." Again on p. 9 he says: we did remove the negroes immediately from the jail to the Schooner, and got a Steamer to tow us in the bay." "We put them on Schooner Magnet—divided them at sea,—I sold mine, Farrier disposed of his, or has them now, and the Marshal sold Bennett's. WE put them on the Schooner to send them where they might be divided without being molested by the Georgia debt of nine thousand dollars. I was with the negroes; Bennett and Farrier were both there; the officer of the Schooner, and Steamer that towed the Schooner down were there, and possibly, some passengers on the Steamer."

In addition to which Mr. Bennett in an affidavit filed in a suit of Charles T. Thornton vs. Bennett and Floyd—which will be found on page 97 of said record, made an exhibit to the bill in this cause. "That the said slaves being the property of one Warren Jordan in the State of Georgia, were fraudulently, clandestinely, covinously, collusively, wickedly, illegally and improperly, against the laws of said State, run off, removed and carried away from said State, by said Jordan and said Reuben Thornton, said removal being made, executed, contrived and devised of fraud, covin, collusion and guile, to convey them from said State, out of and beyond the United States to Texas, to the end, purpose and intent to convert them to their own use and profit, and to delay, hinder and defraud the Georgia Railroad and Banking Company, and others to whom said slaves had been mortgaged, AND OTHER CREDITORS IN THE STATE OF GEORGIA."

Now it is true, that this affidavit does not state when the said Bennett became possessed of the fact that there were *"other creditors in the State of Georgia"* besides this mort-

gage.—And it is not forgotten that said Bennett in his said answer says he has made this affidavit under misapprehension of its contents, yet in connection with the statement made in Exhibit "F." by Floyd and Bennett, to wit: "which said negroes are sold by the said Thornton to us the said R. J. Floyd and A. T. Bennett, subject to all the liabilities that are against them in the way of debt, either by note, *judgment* or mortgage in the State of Georgia, either as the property of Warren Jordan, or the said Reuben Thornton, the said Reuben Thornton only warranting the same against himself and his heirs," added to which a statement in said bill of complaint, that said Bennett at the time of said purchase knew of said judgment of said Carter in Georgia, and that said Bennett does not in his answer expressly deny that he knew or had heard of said judgment but speaks of *"valid claims,"* we can come to no other conclusion but that he knew or heard of said judgment at the time of said purchase.

We do not think it material whether he knew or had heard of said judgment or not, if our view of it is correct, they state under their and hand seal, that said negroes are sold by the said Thornton to them *"subject to all the liabilities that are against them, in the way of debt, either by note, judgment or mortgage in the State of Georgia."*

It may all be true as Mr. Bennett says in his answer, that this instrument was designed as a private memorandum, for the protection of said Thornton's interest, and yet be a declaration or admission of the terms upon which the purchase was made.

A written instrument is construed by courts, and in construing said written agreement, we think the first part

thereof is a declaration of the terms upon which said Floyd and Bennett purchased the said negroes, while in the latter clause thereof, they stipulate not to off-set or plead against the payment of the note therein mentioned, any thing that may be lost by suit in consequence of said claims or that they may have to pay. Mr. Bennett in his answer gives a different version of this agreement, but the answer is only evidence of the facts, to which other testimony could be received, therefore the answer of defendant will not be admitted to show that the true intention of the parties to said written agreement was contrary to what appears on the face of it. Bott vs. Berch, 4 Madd. 255.

It seems clear from the facts disclosed in *connexion* with this instrument, that they purchased only the Equity of Redemption of said Jordan and Thornton, in said negroes, and that as between the parties, the justice and equity and understanding of the purchase (and courts should equitably construe a lawful stipulation,) was that the mortgage of the bank, and the judgment of Carter, were to be met and paid by said Bennett and Floyd, to any amount not exceeding the value of said slaves at the time said liability may be enforced, (if upon the final hearing of this case it should appear from the evidence that said mortgage and judgment were at the time of the purchase, due and owing in the State of Georgia, by either Jordan or said Thornton, and a *lien,* there upon said slaves.)

At any rate we can give it no other construction, unless we declare it an *illegal transaction,* void for fraud or champerty. By thus viewing it, the purchase becomes a bona fide transaction, and the allegations of fraud charged against said Bennett in the bill, fall harmless and are un-

necessary to be considered. If said agreement was executed by said Bennett under false suggestions, assertions and fraudulent representations, and injury thereby inflicted, the Court of Chancery has in this suit on the final hearing, the power to relieve and do equity.

Considering said agreement of purchase a legal transaction, as between Bennett, Floyd and Carter, (provided he is found a mortgage or judgment creditor in Georgia,) it constitutes a constructive trust, a trust raised by courts of Equity in their favor, as an interest in rem, capable of being enforced directly by Carter in a Court of Chancery only. 2 Story's Eq., Ju. page 673, § 1244. Ferris vs. Crawford, 2 Denis, 598, and Eugle vs. Haines, et al, 1 Halsteds Ch. R., 187.

It is contended by Mr. Davis, solicitor for defendants, that the trust is indefinite and cannot be carried out.—We see no reason why the trust cannot be ascertained and carried out in a Court of Equity, particularly under the whole transactions between the parties as they are now before the court.

Judge Semmes of Counsel says, "it was competent in Carter to ratify the trust and insist upon its execution, and he is stopped from insisting upon a trust which through a long course of judicial proceedings, he has heretofore disclaimed." It would have no doubt been much better had said Carter, long ago, filed his bill in Chancery, his neglect to do so, has caused much of the difficulty and perplexity in this cause; but we cannot find in the history of the litigation between these parties that Mr. Carter has either expressly or impliedly disclaimed the trust, he has been

a defendant, up to this suit, in all the litigation excepting the suit against Bennett in Georgia, and in this last suit, Bennett did not set up the trust; there is nothing before us showing that the said trust was ever denied by said Bennett, until this bill was filed, therefore we cannot say said Carter is estopped from insisting upon said trust.

As to the 4th objection. It is no way clear that a court of law could, under its mode of proceeding, give the relief asked for in the bill, as to the suits now pending in the Franklin Circuit Court, between the said parties, and it is doubtful whether a plea of *former recovery* could be pleaded to them, the rule is, that in doubtful cases of this character, Courts of Chancery will entertain jurisdiction. West vs. Wayne, 3 Missouri, 16, 1 Story's Commentaries, § 32.

As to the 5th objection. We do not think under the circumstances, the judgment rendered in said action of Trover between the said Bennett and Carter, should be considered as a final and conclusive adjudication, in respect to said mortgage and the ownership of said mortgage, because they were not and could not have been fully considered and determined. Had said mortgage and the ownership of said mortgage been fully before the jury, and proven to have been duly assigned to said Carter, under the charge of the court, no such verdict could have been rendered without having been set aside, as contrary to law and the charge as given by the Judge on the trial of said cause in 6th, 7th and 8th instructions asked. Neither the notes or the ownership of the mortgage were in evidence, and as to them, between Carter and Bennett, Carter was, as stated in the opinion of the court in this cause, 4 Fla. R., page 348, a stranger.

The jury considered the judgment in the foreclosure suit, (which was in evidence) erroneous and fraudulent.—This court has affirmed their finding and declared the judgment illegal, therefore the defence could not at that time and under the circumstances be made available in that suit. It is true, as is urged by the counsel for the defendants, that on said trial an attempt was made to introduce the said notes, and thereby affirm the assignment of the mortgage to said Carter, and that the same was unsuccessful, and said Carter then relied upon said judgment of foreclosure for his defence, which was considered erroneous, consequently fraudulent, yet this is nothing more than an unsuccessful attempt to defend under the judgment of foreclosure and fraud.

As we have already seen, the mortgage and the ownership of said mortgage, could not have been considered and determined by the Jury, for they were not in evidence; the notes to secure which, it is alleged the mortgage was given, were ruled out and withdrawn, and not again offered.

It is contended by the defendants, that the prayer of the bill asking foreclosure of said mortgage cannot be granted. The judgment of foreclosure on the petition, having been declared a nullity and void, we see no difficulty in the way of foreclosure of the seventy-nine negroes, brought to this State and embraced in said mortgage as part of the relief asked in said bill.

It is admitted, as contended, that the proceedings to foreclosure in *equity* is altogether a proceeding in rem, and the estate of the mortgagor cannot be reached further than the property subjected in the mortgage, to the

payment of the mortgage debt; nevertheless, there is no difficulty under the peculiar circumstances of this case in carrying it out. The mortgagee, (Carter,) is the complainant; he comes to the court asking equity, of course he can be required to do equity. The Chancellor has full power to require him to submit the 17 negroes in his possession as mortgagee, to the foreclosure and sale, as also to acquire an account of the hires and increase. Besides it appears that some of the negroes are still in this State, and Bennett who has appeared and answered this bill of complaint, and who is the purchaser of the equity of redemption, can be required to bring forward the negroes which he has or should have, and in the event he does not, he and said Floyd as trustees, under their agreement aforesaid, may be decreed to pay the value of said negroes. This is not subjecting the purchaser of the equity of redemption to personal accountability, under an application to foreclose a mortgage; but it is subjecting him or them to personal accountability in pursuance of their agreement of purchase; nor it is subjecting the estate of the mortgagor *further* than the value of the property subjected to the payment of the mortgage debt.

As we have already said, Carter having submitted to the jurisdiction of this court, and asks from it equity, in making him do equity, the judgment of Carter vs. Bennett, in Georgia, and which has been converted to a judgment in Florida, may be acted upon as the equities of the whole matters may seem best. So as to the judgment in Trover of Bennett vs. Carter. This also arises out of the mortgage transaction, and forms a part of the matters involved in litigation. In doing equity we see no reason why the judgment may not be permitted to stand restrained by the

injunction and be adopted by said Chancellor as an adjudicated amount for hires and damages for the *trespass* in having illegally taken into possession said 14 negroes, or if in his opinion, after hearing all the testimony, he should think the amount recovered grossly unconscionable, then he would have power to reduce the amount to such sum as might be considered right and proper.

If in any of the transactions in Georgia, or acts of Carter there, a credit in view of all the circumstances should be made by way of reduction or payment on said mortgage in this suit, the defendants Bennett and Floyd will have an opportunity of showing the same and claiming the credit.

It is insisted that the said Carter caused the equity of redemption in the real estate in Hall county, Georgia, to be levied upon there and sold under his said judgment at law, instead of under a decree of foreclosure to satisfy the mortgage debt, and purchased it in himself, thereby uniting the legal and equitable title in him, and that *this is an extinguishment* of the mortgage debt.

Whatever might be said in this respect in a suit between Carter and the representatives of Jordan, (the mortgagor,) we do not think the position applicable to this case, under the circumstances attending it. The construction which we have given of the agreement of purchase of the equity of redemption in these 79 mortgaged negroes, is, that Bennett and Floyd, (the purchasers,) agreed that this mortgage debt and others mentioned should be paid out of said negroes, or they would meet and pay the same to an amount not exceeding the value thereof, consequently any sale of said real estate on the judgment debt could work no injury to them, so far as this mortgage is concerned, but as to

the said judgment and the claims of Carter against them, under it, any acts of said Carter's in Georgia or elsewhere, such as fraud, collusion in sale, &c., operating an injury to said Bennett and Floyd, or either of them, are proper matters of security and adjudication by the court on the final hearing under the proofs, and such credits may be decreed as are proved equitable and proper.

The 6th, 7th, 11th and 12th objections are considered and disposed of in what has been already said.

As to the 8th, 9th and 10th objections, we do not think under the *circumstances* as narrated in the record of said trial of Bennett vs. Carter, in Trover, the Court of Chancery is authorized under the principles of the court or of sound discretion, to interfere *further,* than has been already stated in this behalf, should be done by reduction if considered just so to do under the peculiar equities of this whole litigation. Bills for a new trial according to Lord Redesdale, Bateman vs. Wiloe, 1 Schoales and Lefroy, 201, have not of late years been much countenanced in England. They are very rarely entertained in the Courts of Chancery in this country, and never excepting in a very clear case of fraud or injustice, or upon newly discovered evidence which could not possibly have been produced at the first trial. See also Floyd vs. Jane, 6 John Ch., 480.

It is laid down in Story's Equity Jurisprudence, vol. 2, §888, that "in general it has been considered that the ground for a bill to obtain a new trial after judgment in an action at law, must be such as would be the ground of a bill of review of a decree in a Court of Equity, upon the discovery of a new matter."

Again in §887 the said commentator says: "*any facts*

which prove it to be against conscience to execute, such judgment and of which the injured party *could not have availed himself* in a court of law, will authorize a Court of Equity to interfere by injunction."

Did this bill present *no other* matters of relief but a new trial we should not grant it.

As to the 13th objection. It is stated with uncertainty and very vaguely in the bill, that this judgment of Roberts, Allen & Co., was at the trial and is now the property of said Bennett, and that the same was prosecuted for his benefit, and it was for slaves which had been recaptured by said Bennett. Although said Bennett is specially interrogated in the 18th interrogatory of the bill as to these facts, yet he does not seem to have answered said interrogatory in this particular.

Should it appear as charged, it would then be a part of this transaction or litigation, and the same course can be pursued in the Chancery Court as is pointed out in the other judgments.

As to the last objection. We have no *"fees or costs"* of Attorneys in this State taxable as between litigant or client and attorney, other than is provided by the Statute (see Thompson's digest 326,) and known as "Commissions for collecting."—That act provides "That it shall not be lawful for any Solicitor to charge more than five per cent on claims placed in his hand for collection, unless a specific contract *in writing* between the parties exists to the contrary; nor shall such charge be made except on amounts actually collected ?

From this Statute it is ascertained what we are to consider in this State shall be *"fees"* of Attorneys or Solicitors

in matters of collection, but for *other services* not of this denomination, and such as are claimed by the Solicitors in the case at bar a *reasonable* and fair remuneration (quantum meruit) should be ascertained and allowed, and thus allowed will also constitute "fees or costs." And the same rule of law respecting their *liens* so well established in England, where those fees or costs are taxable, should prevail here.

While our courts hold the members of the bar to strict accountability and fidelity to their clients, they should afford them protection and every facility in securing them their remuneration for their services. An attorney has a right to be remunerated out of the results of his industry, and *his lien* on these fruits is founded in equity and justice.

The bill alleges in this case, that said Bennett is insolvent and has removed from the State. The Solicitors then are without hope of payment, unless it can be secured out of this judgment of Bennett vs. Carter, which is the result of the litigation for which they claim payment.

While we adopt as a rule, the doctrine of the Courts of Chancery in England, as laid down in Ex parte Rhodes, 15 ves. 541 by Lord Eldon, that the right of set-off prevails in general cases, so as to interfere with the Solicitors lien upon the debt recovered, yet as was said by Chancellor Walworth in Dunken vs. Vaudenbergh 1 Paige 626, *"where other claims arising out of different transactions and which could not have been a legal or equitable set-off in that suit, exists between the parties, the court ought not to divest the lien of the Attorney or Solicitor which has already attached on the amount recover-*

ed for the cost of that particular litigation." When a party applies to the equity of the court to prevent the Solicittor from exercising his legal right to collect his costs, *the equity of the Solicitor to have those costs should be taken into consideration.*"

The complainant applies in this case to the equity of the court to prevent the solicitors from collecting their costs by enforcing the judgment against him.—The *trust* of Bennett and Floyd arising out of a different transaction than that for which said judgment was recovered, could not have been a legal or equitable set-off in that suit for until foreclosure and sale of the mortgage negroes, the extent of a personal liability could not be ascertained; consequently this case comes exactly within the exception.

The greater difficulty in this respect is, that the amount of solicitor's fees, respectively, are as yet undetermined.

The bill denies that said claims for fees exists, and insists that if their liens do exist, the amount of the said several claims ought to be reasonably adjusted and allowed by the court. Mr. Bennett in his answer says, the fees on said judgment in Trover are the sum of $5000 to Judge Semmes and to Mr. Davis, $3,700, but he does not inform us, whether this amount was fixed by agreement in writing, or when it was agreed upon, or whether agreed upon at all, or whether they are a mere charge made by them without any agreement.

In the answer of Judge Semmes, which was filed after said injunction was dissolved, he states, that for his services in said suit he is entitled to the sum of $5,000—that said sum was due and owing him long before the filing of this bill.

Mr. Davis in his answer, which was also filed after injunction dissolved says "that by contract with A. T. Bennett he was to receive" &c.; in another place he says, "that by agreement" &c. but he does not state when said contract was made, nor whether it was in writing, nor is any written contract or written agreement referred to as an exhibit.

It therefore becomes necessary, that in inquiry and investigation should be had and the extent of the lien ascertained, which should be a *reasonable* and *adequate* compensation. This can be done at the final hearing of this matter and the Chancellor can then make such a decree in this respect, if he finds no difficulties in the way, as the proofs may warrant and as to him may seem right and just, and secure the payment out of the said recovery or recoveries as a *prior* equity.

The claim of defendant May as assignee of this judgment of Bennett vs. Carter was briefly commented upon in the argument, and it is presented in the bill and answer of Bennett as well as of May. Bennett states *he still* has an *interest* in said judgment. It matters little whether he has or not; Mr. May took the assignment as a collateral security only, according to his own showing, and were he an out and out owner of it, under complete and full assignment, he would hold it subject to anterior equities.—2 Kelly 155.

It is obvious that in this view of the case, the Court cannot dissolve the injunction or dismiss the bill. The order dissolving the injunction was erroneous; the injunction must stand and the cause remanded to the Circuit Court for further action.

It will be seen that this court as an Appellate Court, has adjudicated many of the leading questions, which should have been first decided, by the judge in the court below—a practice of very doubtful propriety. As these questions were so fully and at length, urged by the counsel of *both* parties, we consented to thus consider them; it is not however, to be considered so as to operate as a precedent in other cases.

DECISIONS

OF THE

Supreme Court of Florida,

AT

February Term, 1855,

Held at Jacksonville.

JOSEPH A. BARBEE, PLAINTIFF IN ERROR VS. THE JACKSONVILLE AND ALLIGATOR PLANK ROAD COMPANY, DEFENDANT IN ERROR.

1. The act of the General Assembly, incorporating the Jacksonville and Alligator Plank Road Company, is not in conflict with nor does it contravene either the 24th Section of the 1st Article, or the 4th Section of the 13th Article of the Constitution of the State.
2. If the defendant demur to the whole declaration and any one of the counts be good, the plaintiff shall have judgment upon the count.
3. Whether a corporation can maintain an action upon an *implied* promise for the collection of assessments made on the shares of stock owned by a corporator, and whether the mere *subscription* for stock, raises an implied assumpsit, quere?

4. Where there is an *express agreement* on the part of the stockholder to pay for the shares of stock allotted to him, upon default of such payment he may be proceeded against by *action* at the suit of the corporation, notwithstanding the Charter may provide for the forfeiture or sale of the shares of delinquents
5. The failure to file a "bill of particulars," cannot be taken advantage of by demurrer to the declaration.

Writ of Error to the Circuit Court for Duval County.

This was an action of assumpsit instituted against the plaintiff in Error, to recover the amount of divers assessments upon the shares owned by plaintiff in Error in the capital stock of the said company. The first five counts of the declaration are based upon a promise to subscribe for stock, made anterior to the incorporation of the Company. The next five counts are for the several assessments, and they respectively allege a subscription made after the incorporation of the Company by the plaintiff in Error, for ten shares of stock. The Eleventh count is for the aggregate amount of the assessments, and the consideration alleged for the promise, is ten shares of the capital stock in the Company. The twelfth count is an indebitatus count for money due and payable on account of divers instalments due upon said shares of stock.

The plaintiff in Error demurred to the declaration and assigned the following causes of demurrer:

I. That the act of incorporation creating the said plaintiff (defendant in error here,) a body corporate is unconstitutional and void.

II. That the first counts in said plaintiff's declaration are and each of them is based upon promises charged and alleged to have been made to plaintiff prior to the act of incorporation.

III. That if the defendant is a stockholder in the said Plank Road Company as is alleged in said plaintiff's declaration, he is not subject to a suit for the amount of his stock subscribed for, in this form of action.

IV. That the charter of the said company prescribes the remedy against defaulting stockholders.

V. That the said plaintiff has no where alleged in his said declaration that forty thousand dollars of stock had been subscribed for before said company went into operation, and further because the said plaintiff no where alleges that the other conditions precedent required by the said charter to be preferred before said company could be properly organized, have been performed.

VI. That no proper cause of action has been filed by the said plaintiff in the said cause.

VII. That the said plainitff does not state in said declaration by whom the subscriptions were received.

The court below overruled the demurrer, and judgment was given by the court (a jury being waived,) on an agreed state of facts, in favor of the plaintiff, (defendant in error here,) for the full amount of its demand.

McQueen McIntosh for Plaintiff in Error.

G. W. Call, Jr. for Defendant in Error.

DuPONT, J. delivered the opinion of the court.

This was an action of assumpsit, instituted in the Circuit Court of Duval county, by the respondent, for the recovery of a sum of money claimed to be due from the plaintiff in error, for divers assessments alleged to have been made upon certain shares owned by him in the capital stock of the said company. The declaration contains twelve counts, the first five of which are upon a promise to subscribe for

stock, made anterior to the incorporation of the company. The next five counts are for the several assessments, and alledge respectively a subscription for ten shares of stock made in writing *after* the date of the act of incorporation.

The eleventh count is for the aggregate amount of all the assessments, and the consideration for the promise is alleged to have been ten shares of the capital stock of the said company and which is deverred to have been subscribed for by the plaintiff in error, *after* the passage of the act of incorporation. The twelfth is an indebitatus count for money due and payable on account of divers instalments due upon the said shares of stock.

To the declaration there was a general demurrer to the whole declaration filed, and in which was set forth divers special causes of demurrer, which will be particularly noticed hereafter.

After due consideration, the court below overruled the demurrer and by agreement of parties, a jury being waived, the case was submitted to the court, upon an agreed state of facts, who thereupon gave judgment for plaintiffs, for the full amount of their demand. The only question submitted for our consideration is as to the correctness of the judgment overruling the defendant's demurrer, and in order to a proper elucidation of the subject, we will proceed to consider the several points, in the order in which they are presented.

The first ground of demurrer set forth is, that the act of incorporation creating the said plaintiff a body corporate, is unconstitutional and void. In proceeding to consider this ground of objection, the first point presented is, does the demurrer raise the question of constitutionality? Mr.

Chitty in his work on pleading states the office of a demurrer thus:

"When the declaration, plea or replication, &c., appears *on the face* of it and without reference to *extrinsic* matter, to be defective either in substance or form, the opposite party may in general demur. A demurrer has been defined to be a declaration that the party demurring, will 'go no further,' because the other has not shown sufficient matter against him, that he is bound to answer." 1 Chitty pleading, 661.

And again: "It should, however, be remembered that a demurrer admits the *facts* pleaded and merely refers the question of their *legal* sufficiency to the decision of the court." Ibid.

Mr. Archbold says: "By a demurrer the party pleading it admits the truth of all facts correctly pleaded in the preceeding pleading, but demurs that they are sufficient to maintain the action, or (if pleaded by the plaintiff,) to bar him from maintaining his action, thus referring the law arising on these facts to the judgment of the court. Archbold's Civil Pleading, 308.

Now what is the fact in this connection, which appears on the face of the declaration, and which according to the principle above stated, is to be taken as admitted or confessed by the demurrer? The averment contained in the first five counts of the declaration, is "the defendant with divers others, were *duly* incorporated by an act of the Legislature of the State of Florida, for the purpose of the construction of the Plank Road aforesaid, by the name and style of the Jacksonville and Alligator Plank Road Co," and each of the succeeding counts contains the same

averment in substance. The fact that the company had been *duly* incorporated is here expressly admitted by the demurrer, and the constitutionality or legality of that act of the Legislature cannot be thus enquired into, as it amounts to a *denial* of the *truth* of a *fact* expressly averred upon the face of a declaration. If the defendant should desire to present the constitutional question to the court, it must be done by a special *plea*.. This court is not in the habit of deciding questions which do not legitimately arise out of the proceedings contained in the record; but inasmuch as the question was zealously pressed and very ably argued by the defendant's counsel, and as it appeared to be the mutual desire of the parties to obtain the opinion of the court upon it, we have departed from our usual practice, and have consented to consider it, as one of the questions arising in the case.

The position assumed by the counsel is, first that the act of incorporation creates a *"monopoly,"* inasmuch as it grants to the corporators exclusive privileges; and

Secondly, that it is a *"perpetuity,"* there being in the charter no limit to the time of enjoyment, and that for these reasons it is in direct conflict with the express provisions of the Constitution of the State, and therefore void.

We have been referred upon this point to the 24th section of the 1st article of the Constitution, which is in these words:

"That perpetuities and monopolies are contrary to the genius of a free State and ought not to be allowed," and again to the 4th section of the 13th article, which reads as follows: "No bank Charter or any act of incorpora-

tion granting *exclusive privileges,* shall be granted for a longer period than twenty years, and no Bank Charter shall ever be extended or renewed." These are the only provisions of the constitution which have been brought to our attention, and in order to ascertain their bearing upon the question, it becomes necessary to consider what is the meaning of the several terms, *"perpetuities" "monopolies,"* and *"exclusive privileges,"* as they are used in the constitution.

With regard to the term "perpetuity," we are clearly of opinion that the convention which framed the constitution, intended to use it in its legal acceptation, only as applicable to *estates.* A perpetuity may be defined to be such a limitation of property as will render it unalienable beyond the period allowed by the common law, that is to say, for a life or lives in being and twenty-one years beyond. If we are correct in regard to the intention of the convention, it becomes manifest that this act of incorporation is not in conflict with the clause of the constitution in which that term is used.

In regard to the other terms used in the constitution, viz: "monopoly" and "exclusive privilege," we cannot better express our views than by quoting the language of Mr. Walker in his recent treatise on American law; at page 208, he says, "many of the most important branches of trade and manufactures, all banking and insurance operations, and many of our internal improvements are undertaken and carried on by incorporated companies. Yet although so much of good is thus effected and without any very palpable evil, it is not uncommon to hear corporations denounced as *monopolies,* created for the benefit of the few, to the prejudice

of the many, and hostile to the great republican principle of equality. But corporations are not necessarily monopolies, in the odious sense of that term. A monopoly, as the name imports, is a special privilege conferred on one or more persons, to the absolute exclusion of all others. In this sense it is deservedly odious, because it is essentially anti-republican. But our corporations are not in this sense monopolies, although charters frequently and confessedly enable the members of corporations to enjoy capacities and realize advantages, which they would not enjoy and realize as private individuals, and thus have something of the appearance of creating monopolies, yet so long as no *exclusive privileges* are in fact conferred upon any particular corporation, and no class of persons are prohibited from membership, they can with no propriety be said to create monopolies. Our *Banks* are the nearest approach to monopolies, because individuals are expressly prohibited from banking privileges. Yet even our banks are not in fact monopolies, because no individuals are excluded from becoming stockholders, if they have the will and the means."

The second ground of objection is, that "the first five counts in said plaintiff's said declaration, are and each of them is based upon promises charged and alleged to have been made to plaintiff prior to the passage of the act of incorporation." We deem it unnecessary to the correct decision of this case, to determine or even to consider this objection, for even should it be well taken, there are other sufficient counts contained in the declaration which are not obnoxious to the objections; and it is an admitted principle in pleading that if a defendant demur to the whole decla-

ration, and any one of the counts be good, the plaintiff shall have judgment upon that count. Chitty on Pleading, 664; Archbold on Civil. Pleading, 309; 1 Saunders, 286; 1 Wilson R., 248.

The third objection is that "if the defendant is a stockholder in said Plank Road Company, as is alleged in said plaintiff's said declaration, he is not subject to a suit for the amount of his stock subscribed for, in this form of action."

The fourth objection, which is in the following words, to wit: "that the charter of the said company prescribes the remedy against defaulting stockholders," raises the same question as is raised by the third, and the two may therefore be considered together.

The argument made upon this point by the defendant's counsel, is based upon the provision contained in the 6th section of the act of incorporation, and which provides that "in case of non-payment of any instalment by a stockholder after due notice by publication or circular for two months, such stock and all previous payments thereon shall be forfeited to the company.

The first position assumed in the argument upon this part of the case is, that "where the act of incorporation gives no express remedy against a member for assessments, he is liable to no action," and various authorities are cited in support of the position. The case of Cutter vs. the Middelsex Factory Company, (14 Pick. R., 483,) would seem to sustain the position assumed in the argument. The court say in their opinion in that case, "by virtue of this act, the remedy to enforce the payment of assessments was by sale of the shares, no action would lie either against the

proprietor himself or his executor." But they further remark that "the liability of this corporation depends upon the statute of 1808, C., 65, the original act regulating manufactoring corporations, to the provisions of which express reference is made in the original act of incorporation," and not having access to that statute, in order that we might examine its varied provisions, it is impossible to say how far it may be taken to sustain the position as a general proposition of law. There may be contained in that statute for ought that we could know, some *negative* provision which its operation may have restricted the company to the remedy by sale.

The case of the Andover and Medford Turnpike Corporation vs. Gould, (6 Mass. R., 286,) was also cited to the same point, as also the case of the Franklin Gass Company vs. Thomas White, (14 Mass. R., 286,) but they do not in our opinion sustain the position assumed. The question discussed in the former case, which is a leading one on the subject, was not whether the right to maintain an action for assessments on stock, depended upon a power expressly granted in the charter of incorporation, but the point was whether the corporation could maintain an action upon an *implied* promise, growing out of the act of subscription by the corporator. Parsons, C. J., with his usual clearness, discusses this question with marked ability and the conclusion at which he arrives is "that when the corporators *expressly agree* to pay the assessments, to induce the corporation to make the road, an action can be maintained on that agreement, that if there be no such agreement the remedy for the corporation is by sale of the delinquent's shares, pursuant to the statute." He also in that opinion

considered the further question, whether the "subscription paper," which had been signed by the defendant, amounted to an *express promise* and determined that it did not and that the action could not be maintained. But it is proper to remark that upon reference to the subscription paper, referred to in that case, it will be found to contain no promise or agreement *to pay*, it is simply an agreement *to take* so many shares of stock, and to become proprietors in the said corporation. We desire to be understood as expressing no opinion in regard to either of the propositions decided in that case, as they do not necessarily arise, nor is the determination of either of them essential to the decision of this cause. It will be time enough when a case shall be presented to us in which the questions do arise, to decide whether an action may be sustained by a corporation upon an *implied* promise, whether the mere agreement to subscribe for shares of stock, as evidenced by the subscription book or in any other manner, shall be taken to raise an implied promise. Until such case shall arise, we desire to leave the questions open for more mature consideration. Much may be said on both sides, and especially where reference is had to the particular phraseology of the several sections contained in the charter of this corporation. In the first section of the act, the usual power to sue in their corporate name is expressly granted to the company. By the first clause of the sixth section, the corporation is authorized to "*call* for and *demand* from the stockholders respectively, the full amount of the shares of stock by them respectively subscribed, &c." Here the right to "*demand*" is expressly given, and we are to give the term its legal signification, viz: a peremptory requisition, as contra distinguished from

a mere *request* which might or might not be responded to by the stockholder at his option. If this be a *right*, it would seem to result as a necessary consequence, that the common law remedy to enforce the right, that is by action, is also granted. But as before intimated, we leave the question open, as not being involved in the consideration of his case.

It certainly cannot be said that the actual forfeiture of the stock, would in any manner effect the realization of the amounts due for the assessments, and even a sale of the same, would but in very few cases ever produce that result.

In the case at bar the allegation is expressly made in the 6th, 7th, 8th, 9th and 10th counts of the declaration, that "the said defendant made and executed a promise or agreement in writing, and delivered the same to the said plaintiff, by which he the said defendant undertook and promised to pay to the treasurer of the said plaintiff, the amount of one thousand dollars for the said ten shares of stock, in such amounts and at such time or times, as should or might be required by the Directors of said Company." This being an express averment contained in the declaration, the demurrer is to be taken to admit the truth of the fact so alleged and the authority cited, goes strongly to sustain the plaintiff's case. There were numerous authorities cited by the counsel for the plaintiff below, which all go to support the position that, where there has been an *express promise to pay,* the corporation may proceed by action for the recovery of the assessments, and we have been able to discover nothing in the authorities cited on the other side which would even seem to contravene that doctrine. The

time allotted to the court does not admit of our going into an extended examination of the cases cited, nor indeed do we deem it necessary for the purpose of this case, that we should do so. It will suffice to allude to the leading cases as they are collected in Angell and Ames on corporations.

In the case of "The Worcester Turnpike Co. vs. Willard" (5 Mass. R. 80) the court decided that the defendant having subscribed a contract by which he engaged to take one share, and *to pay all legal* assessments it was a personal engagement to pay assessments, which gave the corporation, a *cumulative* remedy against Willard, in addition to the remedy provided by the statute to enforce the payment of the assessment by a sale of shares. In the case of "Taunton and South Boston Turnpike Co. vs. Whiting" (10 Mass. R. 327) the case was where one subscribed an engagement to pay on demand to J. G. or order, "all assessments that may at any time be made by said corporation for the purpose of laying out said road, making and keeping the same in repair, and for damages to individuals for land &c".— It was holden agreeably to the above case of Worcester Turnpike Co. vs. Willard, that the defendant having expressly promised to pay all assessments, he was liable, *in an action of assumpsit,* brought by the corporation for the assessments.

Angell and Ames in their work on corporations (495 & 8,) lay down the doctrine on this subject very broadly, thus; "If a person has incurred a liability to be sued upon a subscription as upon a promise, according to the rules we have laid down (though a penalty be given by statute for non-payment,) he is still liable in an action of assumpsit.

ıe penalty of forfeiture is cumulative." In the case of e Delaware and Schuylkill Navigation Co. vs. Lawrence nny (Term) R 70 the subscribers to the stock signed an reement to pay two hundred dollars for each share, as e same should be called for; and the act of incorporation flicted a penalty of five per cent. per month, upon de-ulters, and directed that when the penalty should amount the sums paid in, the shares should be *forfeited.* There ing an express promise *to pay,* the court held that the com-ny might waive the forfeiture and proceed personally ɔon the promise. In the case of Goshen Turnpike Co. . Hurtin, (9 John's R., 217,) the question was made ıether the remedy given to the company by the statute, exact the penalty of a forfeiture of the shares and of all ·evious payments, was not the *only* remedy; and the urt expressly decided that it was not. Vide also Angell ıd Ames on Corporations note 2. In the case of "Grays . Turnpike Co." (4 Rand. R., 578,) this question came ɔ for discussion in the Court of Appeals of Virginia. The ıestion depended upon the sixth section of the general Turn-ke law, which enacted that, "if a stockholder shall fail pay the sum required of him, the President and Directors ay sell his stock at auction, and retaining the sum due, ıy the overplus to the owner. But if the sale shall not ·oduce the sum required to be advanced with the inci-ıntal charges, then the president and directors may recov-the balance of the stockholder, by motion and ten day's ɔtice." The stockholders failing to pay the requisitions, ıe stock was advertised but not sold for want of bidders; ıd the question was, whether they were liable to a recov-y by motion for the amount of the requisitions.—There

were other questions in the case, but this was considered by Judge Carr, who gave the opinion of the court, as the most difficult. He however, gave the following opinion in which all the other Judges concurred. "The power to sell the stock of delinquents was given to the company for their benefit. It was thought, no doubt, that this power would coerce the stockholders to punctuality in paying the calls; and if not, would secure to the company the speedy receipt of the money by sale of the stock. But in case this sale should not raise the whole sum, a motion is given for the balance. Now ought we to turn this power of sale, given for the safety of the company, to their ruin? If the stock had sold for a single *cent,* there can be no doubt, that this motion would have been sustained for the whole sum required, even for more than is now required; for the sum given would not have paid the cost of sale, and the motion would have been for the sum required with the addition of such costs." There is a degree of sound practical common sense in the foregoing views which commends them to our cordial approbation. Indeed in this age of enterprise, when all public improvements are accomplished by *associate* efforts, it is of the highest importance, that those who thus associate, should be held to the observance of the most perfect good faith, by compelling them to carry out the agreement into which they may have entered by becoming members of such association. Otherwise, no man would have any guaranty as an inducement for the contribution of his means to the advancement of any enterprise of a public character. If it were the law that an individual stockholder might retire from the corporation at any time and upon his mere whim and caprice, and thereby

incur no further injury than the mere *forfeiture* of his stock, it would give a blow to enterprises of this character, which would be destructive of the best interests of the public. Under such circumstances the most useful enterprises might, at the whim of an individual, be arrested upon the very eve of successful consummation. A proposition which would lead to such results cannot be law, for we are taught that "law is the perfection of reason."

Upon a review of all the authorities to which we have been able to refer, as well as upon principle, we hold the law to be, that when there is an *express* agreement on the part of the stockholder to pay for the shares of stock allotted him, upon default of such payment, he may be proceeded against *by action* at the suit of the corporation, notwithstanding the charter may provide for the forfeiture or sale of the shares of delinquents.

The fifth ground of objection is "that the said plaintiff has no where alleged in his said declaration that forty thousand dollars of stock had been subscribed for before said company went into operation, and further because the said plaintiff no where alleges that the other conditions precedent required by the said charter to be performed before said company could be properly organized, have been performed." This objection was not particularly pressed at the argument, nor do we think that it is well taken. The declaration expressly avers the due organization of the company, and this being admitted by the demurrer, we think is sufficient.

The sixth objection is "that no proper cause of action has been filed by the said plaintiff in the said cause." The statute provides that "all bonds, notes, bills of exchange,

covenants and accounts upon which suits may be brought, or a copy thereof, shall be filed with the declaration. But it has been heretofore decided by this court, that the failure to file the cause of action, cannot be taken advantage of by demurrer to the declaration. Vide McKay vs. Lane 5th Florida, R. 268. And in the case of Watterman vs. Mattair (5th Flor. R. 211) this court held, that this provision of the statute is *directory* only, and if the defendant wants a bill of particulars, he must lay his rule upon the plaintiff, before plea to the action, to file one.

The seventh exception is, "that the said plaintiff does not state in said declaration, by whom the subscriptions were received." This exception was not noticed in the argument and we presume was abandoned by the counsel. We do not think that it was a fact necessary to be stated in the declaration.

Upon a careful review of the whole case we are of opinion that there is no error in the judgment of the Circuit Court, overruling the defendant's demurrer to the plaintiff's declaration. Therefore let the judgment be affirmed with costs.

CHARLES DIBBLE, PLAINTIFF IN ERROR, VS. THE JACKSONVILLE AND ALLIGATOR PLANK ROAD COMPANY, DEFENDANT IN ERROR.

Writ of Error to a Judgment of Duval County Circuit Court.

McQueen McIntosh for Plaintiff in Error.

G. W. Call, Jr., for Defendant in Error.

DUPONT, J.,

This case is similar in all respects to the case of Joseph A. Barbee, (except that one instalment had been paid in, which makes it yet a stronger case,) decided at the present term, and will abide the decision in that case.

Therefore let the judgment be affirmed with costs.

EX PARTE HENRY HENDERSON.

1. Appeals may be taken from the Justice's Court to the Circuit Court and tried by the latter agreeably to the Constitution.

2. The grant of one power by the Constitution is not necessarily exclusive of another power.

3. The Circuit Courts are not confined wholly to cases of original jurisdiction.

4. They have for the most part the power of the Court of King's Bench in England.
5. A mandamus will lie from this Court to the CircuitCourt in case of refusal to entertain jurisdiction when directed by law.
6. The jurisdiction of the Circuit Courts and Supreme Courts compared.
7. The trial of an appeal case by the Circuit Court, is rather the exercise of original than appellate jurisdiction, but whether original or appellate the exercise of the power is not in conflict with the Constitution of the State.

This is an application for a mandamus to the Judge of the Circuit Court of the Eastern Circuit, for Putnam county, to hear and adjudicate an appeal taken from a Justice's Court to the Circuit Court.

To the rule to show cause why a mandamus should not issue, Hon. W. A. Forward, Judge of the Eastern Circuit made the following answer:

Ex Parte Henry Henderson, on motion for Rule to show cause why Mandamus should not issue.

In obedience to rule issued in this cause, the Judge of the Circuit Court most respectfully shows cause as follows, to wit:

In the *first* act organizing the "Territory of Florida," Congress enacted, "That the Judicial Power shall be vested in two Superior Courts, and in *such Inferior Courts* and *Justices of the Peace,* as the Legislative Council of the Territory may from time to time establish."

The Legislative Council established County Courts and Courts of Justices of the Peace, with appeal from Justice's Courts to the County Courts.

It was *not, however,* until the third amendment was made by Congress, to wit: on the 26th March, 1824, that it was

provided the *Superior Courts* "SHALL HAVE AND EXERCISE APPELLATE JURISDICTION OVER THE INFERIOR COURTS OF SAID TERRITORY."

This organic act of Congress is to be regarded as the CONSTITUTION of the Territory, containing *grants* of power. See Ponder Executor vs. Graham, 4 Florida R., 23.

After this power was conferred upon the *Superior Courts* the Territorial Legislature passed the act under which it is now claimed, appeals lie to the Circuit Courts of this State, and is the act in question, and which act was in force at the time the State Constitution went into effect in 1845.

When passed it was a constitutional and binding law, and proper for the action of the Territorial Legislature.

The question is whether on the organization under our State Constitution, it is in conflict with that Constitution.

Upon our passing from a Territory to a State, our State Constitution differed from the *powers* conferred by acts of Congress in this, that it was a *"restriction of power primarily possessed."* See Ponder vs. Graham.

We framed our Constitution immediately in succession of Arkansas, and from the Constitution of that State we seem to have drawn largely. Yet it will be seen that their Constitution expressly provides, that "the Circuit Courts shall exercise a superintending control over the County Courts and over Justices of the peace." See collection of American Constitutions. Upon examining the State Constitutions, it will be found that in every State where Circuit Courts have appellate jurisdiction it is *expressly* conferred.

By the Constitution of the State of Florida, the "judicial power" of this State is vested in a Supreme Court, Courts of Chancery, Circuit Courts and Justices of the Peace, and the General Assembly may vest criminal jurisdiction, (not capital,) in Corporation Courts.

The second section of the fifth article says: "The Supreme Court, *except* in cases otherwise directed in this Constitution, shall have appellate jurisdiction *only*, which shall be coextensive with the State, under such restrictions and regulations not repugnant to this Constitution, as may from time to time be prescribed by law, provided, that the said Court shall always have power to issue writs of injunction, mandamus, quo warranto, habeas corpus, and such other remedial and original writs as may be necessary to give it a general superintendence and control of all other Courts.

The Supreme Court of Florida, in ex parte White, 4 vol., page 165, in giving construction to the above second section, held that the jurisdiction of that Court was two-fold; *first*, appellate jurisdiction; proper, and *secondly*, a general superintendence and control of *all* other courts; and this by means of *all* appropriate, *original* and *remedial* writs known to the common law.

Again, they say, the "exception" in the first clause of the section points to the power contained in the *proviso*, and this power the court would not have had from the mere grant of "appellate jurisdiction only."

And again they say: "It places this court, with regard to all other courts of this State in the same position, in this respect which the court of King's Bench in England occupies, in relation to the Inferior Courts of that kingdom.—

It gives a superintending authority and control, the power to overlook and to govern, check and restrain all other courts."

It would seem then, that the Supreme Court have all the jurisdiction necessary.

Let us see what has been vested in this respect in the Circuit Courts.

The sixth section provides, that "the Circuit Courts shall have *original* jurisdiction in all matters civil and criminal, within this State not otherwise *excepted* in this Constitution.

Here then is a "restriction of power primarily possessed," so far as appellate jurisdiction is concerned, and which was conferred on the Superior Court.

No *appellate* jurisdiction in the Circuit Courts can be found in the said sixth section of the Constitution. And of the *original jurisdiction* thereof, there does not seem a doubt but that *remedial* and *original* writs necessary for a general superintendence and control of *all other* courts, (excepting Courts of Ordinary in the ninth section) are *"excepted"* in the second section and given to the Supreme Court.

And this appears to have been the intention of the framers of the Constitution, for they have *not limited* the Circuit Courts in *original* jurisdiction to *any* amount or proper subject.

Persons are not compelled to sue in Justice's Courts, but if from convenience or expedition in collection; they do resort to that tribunal, then appeal goes to the Supreme Court, as from the Circuit Court to the Supreme Court.

It is contended that there is no express *prohibition* against the vesting appellate jurisdiction in Circuit Courts. If this is a good argument, then it can be invested in Probate Courts or any courts created for that purpose. The answer to such a proposition presents itself, by enquiring from whence the Circuit Court derives its power? It does not derive it from the Legislature. It can only exercise such powers as the Constitution itself confers, or authorizes the Legislature to grant. It can derive no power elsewhere.

In the language of the Supreme Court of Ohio, in Kent, *et al.* vs. Mahaffy, *et al.*, 2 Ohio R., 498, which is a case arising under an act of the Legislature of that State, attempting to confer original jurisdiction on the Supreme Court, by authorizing it to grant an injunction in a case pending in another court, and which by parity of reasoning, is like the case now under consideration, that court says: "It follows that to negative the existence of a power, it is not necessary to show that it is forbidden by the Constitution. It is sufficient that that instrument neither directly nor indirectly confers it. Now as before said, the only original jurisdiction granted to us by the Constitution, is that above mentioned, and the only jurisdiction that the Legislature is authorized to confer upon us as a court, is *appellate* jurisdiction. See Constitution of Ohio, adopted in 1851, and Kent, et al., vs. Mahaffy, et al., above cited.

The tenth clause of the fifth article of the Constitution is in these words:—

"A competent number of Justices of the Peace shall be from time to time, appointed or elected in and for each county,

ıch mode and for such term of office as the General
ably may direct and shall possess such jurisdiction
all be prescribed by law. And in cases tried before
ces of the Peace, the right of appeal shall be secured
such rules and regulations as may be prescribed by

w then it will be seen that *no tribunal* is specified to
ı this appeal is "secured." The natural inference to
ıl mind is that it is to be to the court having *appellate*
liction.

t it is contended that the tribunal is left open as one of
regulations" to be prescribed by law.

may be that fixing a *tribunal* which shall have the
liction of such cases in the face of the provisions of
econd section, which gives to the Supreme Court, "a
'al superintendence and control of all other courts,"
ɜ of the "regulations" spoken of, but we in our humble
nent cannot so view it.

at the right of appeal is "secured" by the Constitu-
there is no doubt, but we think it is to the Supreme
t, which has all the *appellate* jurisdiction, and not to
'ircuit Court, which has only original jurisdiction.

appellate jurisdiction can be conferred on the Circuit
t from one tribunal it can be from all, and there is no
ing in the Constitution where it authorizes the Su-
e Court to issue such *remedial* and *original* writs as
be necessary to give it a general superintendence and
ol of *all other Courts.*

e framers of the Constitution intended that appellate
s and courts of original jurisdiction should be separ-

ate and distinct, and for that purpose provided for the creating of a separate Supreme Court.

Under the Territorial system "which has been acted upon as we think illegally, since the State organization, a man with a $50 debt, may sue in the Justices Court, have a jury trial there, and if disatisfied appeal to the Circuit Court, have *another jury trial,* and then if disatisfied appeal to the Supreme Court, while an individual with a $5000 debt, cannot have but *one jury trial.*

If the constitution intended such a distinction, it is without a parallel in this republic.

Then, in our opinion, the Supreme Court is a constitutional tribunal, and clothed with exclusive appellate jurisdiction.

It is a universal rule of construction, that the grant of a principal power, *ipso facto,* includes all minor, subsidiary powers incidental to the exercise of the main power.

The Legislature possesses no power either by acts of commission or omission, to alter or destroy the separate and independent constitutional jurisdiction of our respective courts. Then by *omitting to act* as well as by acting in an unwarrantable manner, they should not be permitted to defeat the main object and design of the constitution, which is to establish and administer an impartial system of public justice, for the maintenance and protection of personal rights and private property.

G. W. Call, Jr., for the motion.

BALTZELL, C. J., delivered the opinion of the court.

This is an application for a mandamus to the Judge of the Circuit Court of the Eastern Circuit to hear and adjudicate an appeal taken from a Justice of the Peace of Putnam county.

The Constitution of the State provides that "in cases tried before a justice of the peace, the right of appeal shall be secured under such rules and regulations as may be prescribed by law." "Art. 5, section 10th.

The first Legislature provided that "the Circuit Courts respectively shall have and exercise the original and appellate jurisdiction conferred by the Constitution of this State and all original and appellate jurisdiction had by the Superior Courts or the several districts of the Territory of Florida, and of the County Courts of the several counties of the Territory, under the laws of the Territory not inconsistent with the Constitution and laws of the State." Laws 1845 Thomp. 54.

Amongst the laws passed by the first Territorial Legislature in 1822 we find an appeal given to the Circuit Court, on all judgments over ten dollars, and it was to be tried as [soon as] an *original cause* open to all legal testimony, "p. 92. In 1823 and '24, the Circuit Court was directed to hear and determine appeals from justices in a summary way without pleading in writing, according to the justice of the case, p. 244. In 1832 the Superior Courts were directed to try such cases *anew on their merits* and without requiring written pleading. Thomp. 364.

And so the laws have continued to the present day.

It is contended now that the Circuit Court cannot adjudicate these cases, having no power to do so under the Constitution of the State but that this duty belongs to and should be performed by the Supreme Court.

It is very obvious that the Constitution designed some of the tribunal created by it to discharge this function. It seems to have been an object of such consideration

course established by the common law, by writ of certiorari, and judgments of the inferior courts not of record, by writ of false judgment." 4 Arch. prac. 4.

So in New York "it is well settled that on a return to a common law certiorari no other questions can be raised than those relating to the jurisdiction of the court or officer before whom the proceedings are had, and that decisions as to the admission or rejection of evidence or instructions to a jury on submitting the case to their consideration, cannot be reviewed by certiorari, the policy of the law in creating these summary jurisdictions being, that their decisions on the merits shall be final and conclusive, and that if they err upon questions either of law or fact, the parties are without remedy." 1 Graham's Prac. 377.

"This writ, the certiorari, is to restrain the return of all inferior magistrates, within their legal grasp. If they go wrong, upon the evidence, it is the misfortune of the parties. 17 Wendell 668. "So a certiorari was refused because it was founded not on a want of jurisdiction, but on the merits." Nichols vs. Williams 8 Cow. 13. Key vs. White, ad. 2. Denio 549. The People vs. Vermilyea 7 Cow. 108."

In very recent cases says the author above quoted "the Supreme Court of New York has wholly denied their power to re-examine on certiorari, the decisions of inferior jurisdictions on questions of fact, or on the legality of their decisions within their jurisdictions, or that their tribunals are to state facts in their return at all, except such as respects their jurisdictions."

1 Graham 378, Starr vs. Trustees of Rochester, 6 Wend., 564, 17, ib. 64. 2 Hill 9—398.

The appeal then given by the constitution is a proceeding unknown to the English Statutes and common law, hence the rules of distinction of a technical character under those laws are inapplicable to it. It is the statutory regulation existing under the Territorial Government that the framers of the constitution had in view and intended to secure in making the special laws under consideration, and we have already seen that in these statutes the case is treated as an original cause "to be tried anew," otherwise the clause has no operation and will be of no avail. Considered in this light, we feel no difficulty in regarding the constitution as having allusion to these statutes and designing their continuance, and in holding the case to be of original jurisdiction.

In this connection we think proper to remark that the Circuit Courts of the State perform the office and discharge the functions of the Court of King's Bench of England, and not the Supreme Court of the State. This latter is the court of last resort, and has its analogy in the Supreme court of the United States and the Courts of Appeals of the States. Its action is original in the very few cases stated by the constitution, and that rather in aid of its appellate jurisdiction; its appropriate office is to revise and correct the action of the Inferior courts. The circuit court partakes in a degree of these powers, as we shall see by reference to the jurisdiction of the courts of King's Bench "Its jurisdiction is very bright and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, &c. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no other

special remedy. It protects the liberty of the citizens by speedy and summary interposition." 3 Black. commentaries, 42.

In case of trial before the circuit court, the party, if dissatisfied and the sum be sufficient, may take his appeal to the supreme courts but the case is tried there not anew as before the circuit court, but upon errors shown to the court, in the record, by a bill of exceptions, and this constitutes the exercise of appellate power in a common law case, to which the Supreme Court is confined in its adjudication of such cases. But if this court were competent both by the constitution and laws, and could empannel a jury to try such cases, it is very obvious they could not by possibility discharge the duty. The court is holden once a year in four districts, in one county of each district. What then could become of appeals taken in other district counties? Is it not obvious that the right would be in name merely, and of little or no value? Not so with the circuit courts, organized to transact civil and criminal business in every county in the State, whose performance of this duty for so many years past with such entire satisfaction to the public, is the best evidence that the power has been rightfully and properly confided.

If the power were actually appellate, we do not perceive the objection to its being confided to the circuit court. What objection can there exist to the exercise of this power by both courts? None that we can preceive. It certainly increases the chances of right and tends to the advancement of justice without injury to any.

Of the exercise of this power by the circuit court, it may be remembered, as was well expressed in argument

that the term *"only"* used in the clause conferring the jurisdiction on the Supreme Court, is omitted in the clause conferring the Jurisdiction on the Circuit Courts. Now why this omission unless there was a design and a disposition to restrict, not to confine the jurisdiction as in the case of the other court? We are not disposed, however, to rely upon this view, strong and potent as it may be. The objection is, that there is no express grant of the power. Of objections of a like character to the constitution of the United States, the Supreme Court say "the constitution unavoidably deals in general language. It did not suit the purposes of the people in framing this great charter of our liberties to provide for a minute specification of its powers, or to declare the means by which these powers should be carried into execution. It was foreseen that it would be perilous and difficult, if not an impracticable task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure for a lapse of ages, the events of which were locked up in the incontrovertible purposes of providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general object of the charter and restrictions and specifications, which at the present might seem salutary, might in the end prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving for the Legislature from time to time, to adopt its own means to effectuate legitimate objects and to mould and model the exercise of its powers, as its own wisdom and the public interests should require. Hunter vs. Martin, 1 Wh., 304, 326, 327.

Again, in another opinion of the same enlightened tri-

bunal, on another occasion, we have an extension of the same eularged views: "A constitution which should contain an accurate detail of all the minute subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, and of the various subjects of jurisdiction of which its courts may respectively take cognizance, would partake of the prolixity of a legal code and could scarcely be embraced by the human mind. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose these objects be deduced from the nature of the objects themselves."—McCulloch vs. State of Maryland 4, Wh., 407.

Again: "Had the faculties of man been competent to the framing of a system of government, which would leave nothing to implication, it cannot be doubted that the effort would have been made by the framers of our constitution. The fact, however, is otherwise. There is not in the whole of that admirable instrument, a grant of power which does not draw after it others not expressed, not vital to their exercise, not substantive and independent indeed, but auxiliary and subordinate. There is no phrase in it which excludes incidental and implied powers, and which requires that every thing granted shall be expressly and minutely described." Anderson vs. Dunn, 6 Wh., 204. Story, Com. Con., 418.

Again: "It is said that the very distinction taken in the constitution between original and appellate jurisdiction, pre-supposes that when the one can be exercised the other cannot. The exercise of appellate jurisdiction is far from being limited by the terms of the constitution to the Su-

preme court. There can be no doubt that congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. This results from the very nature of the judicial power in the constitution. There is nothing in the instrument which restrains or limits the power, and it consequently must subsist in the utmost latitude of which it is in its nature susceptible. 1 Wh., 337, 9, ib. 820, 6 ib. 392.

Again: "It is admitted that affirmative words are often in their operation, negative of other objects than those affirmed; and that where a negative or exclusive sense must be given to them, or they have no operation at all, they must have that negative or exclusive sense. But where they have full operation without it; where it would destroy some of the most important objects for which the power was created, then we think affirmative words ought not to be construed negatively." 6 Wh., 395.

Again: "It has been suggested that an affirmative provision, in a particular case, excludes the existence of the like provision in every other case, and a negative provision in a particular case, admits the existence of the same thing in every other case. Both of these deductions are or may be confounded in solid reasoning. Thus it was objected to the constitution, that having provided for the trial by jury in criminal cases, there was an implied exclusion in civil cases, as if there was not an essential difference between silence and abolition—between a positive adoption of it in every class of cases, and a discretionary right to adopt or reject it in all or any other cases. One might, with just as much propriety, hold that because congress has power to declare war, but no power is expressly given to make peace,

the latter is excluded; or that because it is declared that no bill of attainder or expost facto law shall be declared by congress, therefore, congress possesses, in all other cases the right to pass any laws. The truth is, that in order to ascertain how an affirmative or negative provision excludes or multiplies others, we must look to the nature of the provision—the subject matter—objects and scope of the instrument; these and these only can properly determine the rule of construction." 6 Wheaton, 395. Federalist, No. 83.

Again: "The truth is that where the words confer only appellate jurisdiction, original jurisdiction is most clearly not given; but where the words admit of appellate jurisdiction, the power to take cognizance of the suit originally, does not necessarily negative the power to decide upon it on appeal, if it may originate in a different court." 9 Wheaton, 820, 21.

We have extended these quotations to some length, that a clear and just view of these exalted instruments may be fixed in the mind and the importance of their observation be fully felt. They are not directly to the point, as in some respects there is not an equal similitude in the provisions of the constitution of the United States and of our State. Their application will yet be at once perceived.

Indeed where could there be an appeal for information on this interesting subject, but to the works and writings of those great men to whom, above all others, we are indebted for the blessings of the liberty we enjoy; who framed and constructed the fabric of our Government upon a basis that we trust is perpetual, and to whom we turn in difficulty as to the great luminary, which sheds light and heat upon

the world. We are instructed by them of the high nature and important character of these instruments, that they are not to be construed in a narrow and restricted light; that the absence of a particular power or its silence, does not necessarily exclude legislation on the subject; that to do this there must be inconsistency, contrariety, opposition, restriction or prohibition, or that the power has been already executed. In the bill of rights attached to our constitution, it is declared "that to guard against transgression upon the rights of the people, we declare that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate, and that all laws contrary thereto, or the following provisions, shall be void." Art. 1st, declaration rights 27 sec. constitution.

We do not perceive repugnancy or contrariety in the exercise of this jurisdiction by the Circuit Court, nor injury, nor inconvenience. On the contrary, we think great detriment and injury would arise to the public from the contrary course. To hold that even the Circuit Court has no appellate jurisdiction, no superintendence or control over other courts, corporations and officers, would be to strip it of most important functions and render it powerless and inefficient in a great degree, for many of the high purposes of justice. With such action, the symmetry of the organization of the courts is preserved; without it, disorder and confusion intervene. Especially so far as the present case is concerned, we have the experience of age—time has consecrated and improved it—fixed it in the affections of the people and to them the loss would be irreparable. We perceive this in the fact, that of the very many cases which have been taken to each term of the Circuit and Superior

Court for thirty years past, scarcely half a dozen of them have found their way to the Court of Appeals or the Supreme Court. Another fact of no light consideration, no attempt at any time has been made to amend, alter or improve the law. Were it a matter of doubt then under this state of facts, we should feel extreme reluctance to overthrow the practice or declare its unconstitutionality. If the sums are inconsiderable, we see no reason for denying to the man of small means the right of adjudication and trial of his case by the Superior tribunals, equally with his neighbor, who has a case of larger amount.

We have given due consideration to the case cited from Ohio of Kint vs. Mahaffy, 2 Ohio Reps., 498, but find in it no conflict with the positions we have assumed. It decides that the Supreme Court of that State will not issue a writ of injunction to the Court of Common Pleas of the State, as this would be the exercise of original jurisdiction. To this we have no objection; it is in effect the same as the decision made by this court in ex parte White, 4, Florida, 170.

It is claimed that the case of Ponder vs. Graham, supports the position of the Circuit Judge, as it holds "that a State Constitution *is a restriction of power primarily possessed.*" 4 Florida, 33.

The question in that case was as to the validity of an act of the Territorial Legislature, with which the Constitution of the State adopted thirteen years afterwards, had no connection. If the meaning is that restriction is the characteristic of State Constitutions, we are not prepared to admit it. The great powers of government are given subject to such restraints only, as the experience and wisdom

of ages have proved to be needful to the protection of the citizen, and such further restrictions upon the agents of the constitution, the associate departments of Government, as will secure the proper working of the machine, and prevent its efficiency from being impaired or destroyed.

We conclude then that whether the jurisdiction to be exercised in the case be original or appellate, the circuit court has the power and should exercise it. But inasmuch as we do not question that the court below would at once accede to the views of this court in this respect, we shall direct the opinion to be certified and withhold the writ.

HENRY ANDERSON, APPELLANT VS. JAMES B. BROWN, APPELLEE.

1. The act of 1845 (Thompson's Digest 50-51) which restricts the jurisdiction of the Supreme Court to the entertainment of "causes brought by appeal or writ of Error from the several Circuit Courts, when the matter in controversy exceeds in amount or value fifty dollars" is compatible with the provisions of the constitution, and that court is not authorized to take or exercise jurisdiction of a cause in which the matter in controversy is below that limit. The case of Curry vs. Marvin (2 Florida Reports 411) referred to and approved.

2. The several acts of the General Assembly granting an appeal from the judgment of a Justice of the Peace, to the Circuit Court (Thomp. Dig. 54, par-

7, and 364, Sec. 1,) do not contravene any provision of the Constitution and are imperative upon the Court.

3. Where the Judge of a Circuit Court shall refuse to entertain jurisdiction of an appeal taken from a Justice's Court, a writ of *Mandamus*, issuing from the Supreme Court, is the appropriate process to compel the exercise of that jurisdiction.

Appeal from a judgment of the Circuit Court for Putnam County. For a statement of the facts of the case, reference is made to the opinion of the court.

G. W. Call, Jr., for appellant.

B. M. Pearson, for appellee.

DuPont J.

The record in this cause presents the following state of case. The appellant commenced his suit before a Justice of the Peace in the County of Putnam, and upon the trial, judgment was rendered for the defendant, for the costs of the suit, which amounted to the sum of three dollars and twenty-five cents. From that judgment the plaintiff prosecuted an appeal to the Circuit Court of the said county. At the Fall Term of the said court, the appeal was, upon motion, dismissed, upon the ground that the Circuit Court had no jurisdiction of the cause. From the judgment of the Circuit Court dismissing the appeal, the appeal to this court is taken, and the preliminary question presented for our determination is, whether this court, in view of the restriction imposed by Statute upon its jurisdiction, can entertain the appeal.

This court has already decided in the case of Curry vs. Marvin (2 Florida R. 411) that the Act of 1845, which restricts the jurisdiction of the Supreme Court to the entertainment of "causes brought by appeal or writ of Error

from the several circuit courts, when the matter in controversy exceeds in amount or value, fifty dollars," (Thomp. Dig. 50 and 51) is compatible with the provisions of the constitution, and that it will not take or exercise jurisdiction, where the amount in controversy is below that limit. The decision in that case being an authoritative adjudication of the question, and receiving as it does our entire approbation, it only remains for us to order the appeal to be dismissed for want of jurisdiction.

It was argued however, that unless the Supreme Court shall entertain the appeal, the party appellant will be without any remedy, inasmuch as the Circuit Court has also declined to take cognizance of the case, on the ground of a want of jurisdiction; and that thus he will be deprived of the right of appeal which is guaranteed to him by virtue of the 10th Section of the 5th Article of the Constitution, (Vide Thomp. Dig. 62.)

Such consequence will not necessarily result from our action in this case, as may be readily perceived by reference to the opinion delivered upon the decision of the case of *Ex parte* Henderson, decided at the present term of this court.

That decision was made upon a *rule nisi* directed to the Judge of the circuit court, calling upon him to show cause why a *Mandamus* should not issue, requiring him to entertain jurisdiction of an appeal taken from a Justice's court. In that case the court held that the act of the general Assembly confering such appellate jurisdiction upon the circuit courts, does not contravene any provision of the constitution and is imperative upon those courts, and that the

writ of *Mandamus,* is the appropriate process to compel the exercise of that jurisdiction.

Let the appeal be dismissed with costs.

WILLIAM B. OTOWAY, APPELLANT, VS. JAMES O. DEVALL, APPELLEE.

1. The Supreme Court has no authority to entertain an appeal from a judgment rendered in a Justice's Court.

DUPCNT, J.

This is an appeal from a judgment rendered in a Justice's court, for the sum of forty-six dollars and eighteen cents.

The question of jurisdiction, which was adjudicated in the case of Henderson vs. Brown, decided at the present term of this court, is the only one that can arise in this case, and is authoritatively settled by that adjudication.

In that case it was decided that the restriction imposed by the statute, prohibits the Supreme court from taking or exercising jurisdiction of causes, in which the matter in controversy does not exceed the amount or value of fifty dollars.

In addition to the views set forth in the opinion delivered in that case, it may be further remarked, that even if the *restriction* did not exist, this court could not, in the present state of the law, entertain an appeal from a Justice's Court, for there is no statute providing for the taking or prosecuting of such, to the Supreme Court. The constitution, it is true, secures to a party in a Justice's Court, the right of appeal, and the General Assembly have amply provided for the exercise of that right, by giving the party an appeal to the Circuit Court.

Let the appeal be dismissed with costs.

SEYMOUR HALLIDAY VS. THE JACKSONVILLE AND ALLIGATOR PLANK ROAD COMPANY.

1. **The Supreme Court has authority to entertain an Appeal, coming up directly from a Justice's Court.**

DUPONT, J.

This is an appeal taken from the judgment of the Circuit Court, held in and for the county of Duval.

The decision made in the case of Henderson vs. Brown, determined at the present term, and the views contained

in the opinion therein delivered, are decisive in regard to this case. This court will not entertain jurisdiction of a cause coming up by appeal, directly from a Justice's Court.

Let the appeal be dismissed with costs.

SEYMOUR HALLIDAY, APPELLANT, VS. THE JACKSONVILLE AND ALLIGATOR PLANK ROAD COMPANY, APPELLEE.

1. Under the latitude given in the *proviso*, to the second section of the fifth article of the Constitution, the Supreme Court has no authority to issue writs of *certiorari*, to any of the inferior jurisdictions; but to obtain its action upon the same, it must be clearly shown, that the case presented is such a one as requires the interposition of the court, in order that justice may be done.

Certiorari to a Justice's Court.

Felix Livingston, for Appellant.

G. W. Call, Jr., for Appellee.

DUPONT, J.

This cause is brought up from a Justice's Court, by writ of *certiorari;* and the question presented for our consideration is, whether this court will entertain jurisdiction of the same.

The second section of the fifth article of the Constitution provides that "the Supreme Court, except in cases otherwise directed in this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the State, under such restrictions and regulations, not repugnant to this Constitution, as may from time to time be prescribed by law; *provided* that the said court shall always have power to issue writs of injunction, mandamus, quo warranto, habeas corpus, and such other remedial and original writs, as may be necessary to give it a general superintendance, and control of all other courts."

It is not doubted, but that under the latitude given by the said proviso, a writ of certiorari will lie from this court to any of the inferior jurisdictions, whenever an appropriate case may be presented, or it shall become necessary for the attainment of justice. This, however, is not such a case; the object of the plaintiff in certiorari, in removing his case to this court, is to have certain errors, which are alleged to have been committed by the Justice of the Peace who decided the case, corrected here. It is a sufficient answer to his application to say, that the statutes have provided an ample remedy for him, by granting to him an appeal to, or writ of *certiorari* from the Circuit Court.—Vide Thomp. Dig., 364.

Let the certiorari be dismissed with costs.

FRANCES, A SLAVE, APPELLANT VS. THE STATE.

1. During the trial of any case not capital, the Court may, in the exercise of a *sound discretion,* permit the Jury, under the p rope charge, to separate.
2. The indictment of a Slave need not state the name of the owne of such Slave.
3. A Slave indicted for an assault and battery, not alleged to hav been committed upon a white person, should be tried under th 6th Sec. of the Act of November, 21st, 1828, entitled "An Ac relating to crimes and misdemeanors committed by Slaves, fre Negroes and Mulattoes."
4. When the record contains a copy of the indictment endorsed b the Foreman of the Grand Jury, *A True Bill,* and a plea of no guilty has been put in, a trial had, a verdict of guilty found, and motion for an arrest of Judgment made and argued, without an objection that it does not appear by the record that the Grand Jury returned the Bill into Court endorsed by the Foreman, "*A True Bill;*" the objection cannot be made in the Supreme Court on appeal in a case not capital.
5. When no exception is taken to the charge of the Court below, in a criminal case like this, and a motion was made for an arrest of Judgment and for a new trial, without alleging it as a ground for such motion there, is too late to make the objection in the Supreme Court.

Appeal from Putnam Circuit Court. [The reporter has not been furnished with a copy of the record, from which to extract the evidence given in to the jury, and must, therefore, refer to the opinion as furnishing all the facts he is enabled to give.]

McQueen McIntosh, for Appellant.

G. W. Call, Jr., for Attorney General, for the State.

DOUGLAS, J., delivered the opinion of the court.

At the fall term of the Circuit Court for Putnam county, in the year A. D. 1853, the Grand Jury who were then and there empannelled and sworn to enquire in and for said county, found and returned into court an Indictment, endorsed by the foreman, "A true bill," against Francis a slave. She plead not guilty. At the Spring Term A. D. 1854, the case came on for trial, a jury was empannelled and sworn who returned a verdict of guilty against her.

Whereupon her counsel moved an arrest of judgment and for a new trial upon the following grounds.

First. That the verdict was contrary to evidence.

Second. That the verdict was contrary to law.

Third. Because the State has failed to allege in the indictment with sufficient certainty, that Frances is a slave or free person of color, and does not allege that she is the property of any person.

Fourth. That the prisoner is not subject to indictment under the act of 1832, but should be punished before a Justice of the Peace under the act of 1828.

Fifth. That the prisoner is not subject to indictment under the last clause of the act of 1828, inasmuch as the indictment no where alleges that the assault was committed upon a white person. Which motion was after argument overruled, and a judgment was entered, from which the prisoner has appealed to this court, and puts in the following assignment of errors, viz.

First. That the court below erred in allowing a portion of the jury to disperse before completing the pan-

el, without the consent, and against the remonstrance of the prisoner by counsel.

Second. That the court below erred in refusing to arrest the judgment and grant a new trial upon the grounds set forth in the motion. These having been already stated, it is unnecessary to repeat them.

Third. That the court below erred in failing to arrest the judgment, because of errors and omissions on the face of the record.

Fourth. That the court erred in its charge to the jury.

Fifth. That the indictment is defective in substance.

The first error assigned (we think) is not well taken. It has been the practice in Florida ever since the organization of our late Territorial Government, a period of more than thirty years, to permit jurors in all cases of misdemeanors, and indeed in all cases not capital, to disperse under the charge of the Court, when it adjourned for the night &c, unless there was some special reason for keeping them together, and it is now too late for the Courts to disturb that practice. In capital cases they have *in favorem vitae,* very properly been kept together. In Virginia, however, it has been held that "where several days are taken up in completing the panel, on a trial for murder, it is not necessary that the Jurors who have been sworn, shall be committed to the custody of the Sheriff until the whole number of the panel is completed." 5 Gratten R. 676, U. S. Dig. vol. 4, p. 290 No. 18. The dispersion in the case at Bar was before the panel was completed.

The following authorities were cited by the prisoner's

counsel in support of the position we are now considering, viz: 3 Blackstone, p. 379, *Note.* 2 Barn. and Ald. p. 462. 8 S. and M., cited in U. S. Dig. 1847, p. 329.—U. S. Dig. 1848, p. 240, No. 540—41, 5 Georgia Rep. 85 and 10, Georgia Rep. 511. Stone's case, in the note to Blackstone, was treason, a capital offense. The case cited, from U. S. Dig. 1848, have very little bearing upon the question; that from 5 Georgia is a capital case. That from 10 Georgia was a case of larceny. Pending the trial, the court was about to adjourn for the night, the presiding Judge enquired what should be done with the Jury. To which the defendant's counsel replied that they were willing the Jury should disperse, and they were permitted to do so. Afterwards this dispersion was assigned by the prisoner's counsel as a cause for a new trial upon a motion made therefor, after a verdict of guilty, but the court overruled the motion, saying, no application should be addressed by the court to counsel to allow the Jury to disperse. It is odious to refuse, and calculated to prejudice the party with the Jury, who withholds his consent. It is a *discretion* says the court which should be very cautiously exercised under any circumstances. We are unable to determine from the manner in which the case from S. and M. is cited, whether it was a capital case or not. And the case in Barn. and Ald. seems rather against the position. That is the case of the King vs. Herrin, Wolf and Levi who were indicted for a conspiracy, a mere misdemeanor. The Jury in that case as in this, were permitted to separate for the night, and a motion was made for a new trial grounded on the suggestion of two facts; first, that the Jury dispersed before the verdict was given, and secondly,

that, that circumstance was not known to the parties until after the trial was concluded. The Judges delivered their opinions *seitatim*. Abbot Ch. J. said, "I am of opinion, that in a case of misdemeanor, the dispersion of the jury will not avoid the verdict. I found my opinion upon the fact, that many instances have occured of late years in which such dispersion has been permitted in the case of a misdemeanor; and every such instance proves that it may be lawfully done."

"It is said, indeed, that these instances have taken place by consent. The consent of the defendant (he said) can make no difference, and ought not to be asked." Bayley, Justice, said: "If the case were one where the propriety of the verdict admitted of a doubt, it would be very proper for the court, as an additional reason for granting a new trial, that the jury had so separated. But I am of opinion that that circumstance standing alone, is not sufficient to vacate the verdict," Halroyd, J., said: "I do not find any authority in the law which states that the mere separation of the jury in a civil action, or in the case of a misdemeanor, is a ground for vacating the verdict." Best, J., observed, "It is said there has been a mistrial on account of the separation of the jury, but I am alarmed at the extent to which that proposition would go. I agree with my brother, Bayley, that no sound distinction can be taken between a separation for a shorter or a longer time. The true rule, (he said) is, that it is left to the discretion of the Judge to say whether the jury are to be permitted to separate or not, and this we consider the true rule;" and it is fully sustained by the case of Davis vs. the State, 15 Ohio Reps., as cited in U. S. Dig. 1847, p. 320, No. 59; and it cannot, says that court,

be questioned on error. We agree with that court that this discretion should be cautiously exercised, and especially in cases highly penal, and when much excitement prevails.

In order to dispose of the *second error* assigned, we return to the grounds of the motion in arrest of judgment, &c., in the court below, which are made the grounds of this assignment, and we observe that the two first were abandoned at the argument here. The third is, that the indictment does not state the name of the owner of Frances. This we deem wholly unnecessary. The State to sustain the indictment must prove the ownership; every slave knows or can readily ascertain who is his owner, and therefore can prepare his defence, so far as that is concerned, without being told that fact. In regard to the *fourth* and fifth grounds alleged in arrest, &c., it is to be observed that this indictment is founded upon the sixty-first section of the act of November 1st, 1828, entitled "an act relating to crimes and misdemeanors committed by slaves, free negroes and mulattoes," (Duval Comp., 228; Thomp. Dig., p. 541, No. 20,) which declares, "that if any negro or mulatto, bond or free, shall commit any other crimes or misdemeanors against the laws of this State, it shall be lawful for the jury convicting him of the same, to punish him by any number of stripes, as they may award, not exceeding one hundred." Assault and battery is an offence, a misdemeanor against the laws of this State; it is a common law offence, and the common law is in force here by a special provision of our statute. Thomp. Dig., p. 21, No. 2. It is one of the *other* misdemeanors against the laws of this State, in regard to which (except by these general

vantage of here, were it erroneous, but having looked into it, we do not discover it to be so.

In misdemeanors, the strictness which formerly prevailed, has been much relaxed in England, (as appears by the case above cited from Barn. and Ald. 462, and many more might be adduced,) as well as in this country, and to some extent in all cases not capital; and it does not appear that any injury has resulted therefrom.

From a careful review of this case, we find no error in the judgment of the Circuit Court, and it is therefore affirmed.

WILLIAM D. BRANCH, APPELLANT, VS. LITTLEBERRY BRANCH, APPELLEE.

1. Applications to set aside proceedings for mere irregularity, should be made as early as possible.
2. If the style of process is "The State of Florida," it is sufficient.
3. Upon the death of the testator or intestate, if any injury is afterwards done to his goods and chattels, the executor or admi

trator may bring an action for damages for the tort, and under the circumstances, he has his option either to sue in his representative capacity, and declare *as* Executor or Administrator, or to bring the action in his own name, and in his individual character.

4. When such a suit is brought by an Executor or Administrator, in his individual character, it is not necessary that there should be a bond binding the estate.

5. Whether such a bond is necessary where an Executor or Administrator sues in such a case, in his representative character *as* Executor or Administrator. *Quere?*

6. In a suit by an Executor or Administrator, in his representative character, he must describe himself and make his claim *as* Administrator or Executor only; describing himself Executor or Administrator is mere *descriptio personae.*

7. The statute declares that the plaintiff in replevin, *or* some other competent person *in his behalf,* shall execute the bond with good and sufficient security; it is not contemplated by the latter provision that the persons signing the bond shall bind any body but themselves.

8. Whether, therefore, an Executor or Administrator can, even in such an action as this, by proceeding as such Executor or Administrator, and executing a bond *as* such, bind the Estate—*Quere?*

9. It is not necessary that the bond, in an action of replevin, should contain a description of the property, but the affidavit must describe it.

10. The value of the property as stated in the declaration, is not the criterion of the value of the property; it is the estimated value (by the Clerk, whose duty it is to prove the bond,) at the time the bond is given, and the plaintiff, by stating in his declaration a higher value, cannot invalidate the bond.

11. If the Clerk in approving the bond add to his name the word Clerk only, it is sufficient if the other proceedings which occurred at the same time as the making of the affidavit, or the issuing of the writ, show of what Court he was Clerk, and that it is the same into which the writ is returnable.

12. Statutory bonds will, in general, be sustained as voluntary bonds, good at common law, although they may not be taken pursuant to the statute, unless the statute has expressly declared them void, or they have been obtained by fraud, or by coercion or oppersion, *colore officii*.

13. The Court may order a pluries writ, in an action of replevin under our statute, or the plaintiff may (in a proper case) cause one to be issued without an order of the Court.

14. By suing out an alias writ, the plaintiff waives (for the time being, at least,) his right under the statute to declare in trover or trespass.

Appeal from a judgment of the Circuit Court for Marion county. For the facts of the case, see opinion of the court.

McQueen McIntosh and B. M. Pearson, for appellant.

J. P. Sanderson, for appellee.

DOUGLAS, J., delivered the opinion of the court.

William D. Branch instituted an action of replevin in the Circuit Court of Marion County to recover a certain stock of cattle. He states in his affidavit that "he is Administrator of the Estate of Samuel E. Swilley, deceased, and that as such Administrator, he is lawfully entitled to the possession of a certain stock of cattle now in possession of Littleberry Branch, numbering about eighteen hundred," describing them and saying further "that the said cattle have not been taken for any tax assessment, or fine levied by virtue of any law of this State, or seized under any execution or attachment against the goods and chattels of this deponent, liable to execution." He also executed a bond in the penal sum of twenty thousand dollars to the said Littleberry Branch, with J. M. McIntosh and A. D. Johnson as his sureties, conditioned "that whereas the above bounden Wm. D. Branch hath this day commenced an action of replevin against Littleberry Branch for the recovery of certain cattle, more particularly described in an affidavit filed herewith. Now if the said W. D. Branch shall prosecute the said action to effect and without delay, and if the said Littleberry Branch should recover judgment against him in said action, shall return the said cattle, if return thereby should be adjudged, and shall pay the said Littleberry Branch all such sums of money as he may recover against him in the said action, for any cause whatsoever, then the above obligation is to be null and void, otherwise, to be in full force and virtue." This bond was approved by the Clerk of said Court, the said affidavit and bond were filed in the office of the Clerk of the same Court, on the 20th of October, 1852, and both of them as well as the writ of re-

plevin, (which it seems immediately issued,) bear date on the same day. The sheriff not having been able to execute this writ, an alias was issued, which also proving ineffectual, a pluries was issued which he returned "executed this writ by having hunted up and delivered to William D. Branch, Administrator, &c., six hundred and thirty-eight (638) head of cattle, of the marks and brands described in the within writ." It appears by the proceedings, that a summons was issued and duly served on the 1st. day of November, 1852.

The plaintiff filed his declaration December 1st., 1853, in the usual form, describing himself William D. Branch plaintiff in this suit, Administrator, &c., &c., and concluded by saying, wherefore the said plaintiff Administrator as aforesaid, saith that he is injured, and hath sustained damage to the amount of twenty thousand dollars and therefore, &c., &c.

The next entry upon the record was made on the 7th of December, 1853, and is as follows, to wit: "Now on this day came the parties, by their respective Attorneys, and this cause coming on to be heard, the defendants counsel moved the court to quash the writ and declaration for a variance between the precipe, writ and declaration; and, also, moved the court to dismiss the suit for want of a sufficent affidavit and bond, and because a pluries writ had been issued in said cause before declaration filed; whereupon the court having heard the argument of counsel, and having considered the matter, overrules the motion to quash said writ and declaration, but sustains the defendant's motion to dismiss said suit for want of a sufficient affidavit and bond, and therefore, it is ordered by the court that the

said suit be and the same is hereby dismissed. Whereupon the plaintiff, by his counsel, prayed an appeal in open court and on the same day. It appears by a subsequent order, that a bond having been duly executed and filed by the plaintiff according to law, and the costs paid, the court ordered "that the said prayer for an appeal be (and the same was thereby) allowed and granted." On the same day a writ of return and restitution of the cattle was ordered by the court, and a jury was empanelled and sworn to assess the damages that the defendant had sustained, by the wrongful taking and detention of said cattle, and who found that the defendant had sustained no damage, &c., &c., which verdict was, on the 10th. day of the same month, set aside, and a new assessment of damages awarded.

On the 6th. day of December 1854, the defendant, by his counsel, J. P. Sanderson and S. St. Geo. Rogers, presented to the Marion Circuit Court, the mandate of this court in this case, and moved to vacate the judgment heretofore entered in this cause, which was done accordingly, and thereupon came the parties, by their respective attorneys, and a jury was empanelled to assess the said damages, who assessed the same at two hundred and seventy-five dollars, upon which verdict judgment was duly entered, and a return of the cattle aforesaid was awarded; and thereupon, the plaintiff again prayed an appeal to this court.

At the December term, 1853, the defendant's counsel moved the court for leave to amend the record of this cause entered at the last spring term of this court, wherever said record shows that Rodgers, defendant's counsel, consented to the order therein entered, granting to plaintiff's counsel leave to issue a pluries writ, and further time for filing of

a declaration. "The court having read the affidavit of S. St. Geo. Rodgers, defendant's counsel, and reference to the Bench Docket of said term having been had, and upon argument of counsel, it was ordered that said record be amended by vacating so much of said order, made at said Spring Term of this Court, as shows such order made at said Spring Term of this court for a pluries writ, and further time for filing a declaration, to have been made by consent of S. St. Geo. Rogers, as defendant's counsel.

Two bills of exception appear in the record, but as they were not noticed in the argument of the case, we do not deem it necessary further to advert to them. Ten errors were assigned, all however, but the first two and and the last, were abandoned at the hearing. The three relied upon are as follows:

First. That the court erred in entertaining the motion to dismiss the proceedings, and quash the said writ of replevin at the third term after the commencement of said suit, an appearance having been heretofore by the said defendant, entered at a previous court, *to wit*: at the first term to which the same defendant was summoned.

Second. That the court erred in deciding that the bond and affidavit filed in the above entitled cause, were insufficient, even not in conformity to law, and thereby dismissing the proceedings in the same, and quashing the writ of replevin.

Tenth. That the court erred in allowing defendant's motion to amend the record in said case.

The case has been ably and ingeniously argued on both sides. It is contended on behalf of the appellant, that the proceedings are regular and correct throughout; that the

suit was commenced by William D. Branch, against Littleberry Branch, as appears by the precipe, affidavit and bond; that in the precipe, nothing is said of the plaintiff, designating him as administrator. That the affidavit states and sets out the grounds of his possessory right in the premises, and is signed by him; that William D. Branch, could not sue as administrator, but only in his own name. That he could not bind the estate (of Samuel E. Swilley,) by a bond, and must *necessarily* have proceeded as he did. That the bond is executed by him, in his individual capacity, and never was intended as an administrator's bond. That the recital in the affidavit, that the plaintiff was administrator, is merely *"descriptio personae,"* and may be treated as surplussage; that the addition of administrator in the writ, cannot invalidate it, and that it was not necessary in the affidavit to state that the property sought to be replevied was not taken for any tax assessments, or fine levied by virtue of any law of this State, or seized under any execution or attachment against the goods and chattels of the estate of Samuel E. Swilley, deceased; that the court erred in entertaining the motion to dismiss the proceedings, and quash the said writ of replevin at the third term after the commencement of the suit, also in deciding that the bond and affidavit were insufficient.

For the appellee it is insisted that the suit was improperly commenced; that the precipe has no venue, that the affidavit does not conform to the requirements of the statute; that the jurat is defective; that the suit is at the instance of the administrator of the estate of Samuel E. Swilley, deceased, and that there is no bond given binding the estate; that the bond is not entitled as belonging to

any court, nor shown in what court the suit was instituted. That the bond does not contain a description of the property, and is not of double the value of the property, as alleged in the declaration; that the bond is not approved as required by the statute; that the writ should show that the affidavit and bond had been filed; that the court did not err in quashing the writ; that the statute requires that all process shall run in the name of the State of Florida; that this does not so run; that the court did not err in allowing the correction of the record, and that it had no authority to grant a pluries writ.

As to the alleged defect in the precipe, if such an objection could be heard at all, it comes too late. Applications to set aside proceedings for mere irregularity, should be made as early as possible. 3 Chitty's General Pr., 511 to 529. If not, it will be waived. 1 Tidd's Pr., 9, 165, 190, 403, 435. So as to the affidavit, that the jurat is defective, and as to the writ, that it does not run "in the name of the State of Florida." The appearance of the defendant was entered at the first term after the service of summons upon him, and no motion was made to quash any of the proceedings for any cause, until the third term. Nor does it appear that any of these objections were taken at all in the court below. As to the style of the process; the Constitution, article fifth, Section fifteen, Thomp. Dig., p 325, No. 3, declares that the style of all process shall be "the State of Florida." The style of this process is "the State of Florida." This we think sufficient. The Constitution of Iowa, requires criminal proceedings to be conducted in the name of the State of Iowa, and it has been there held, that a prosecution in the name of the "State

of Iowa," was valid. Harrison vs. the State, 2 Green, 270, 6 U. S. Dig., (1852,) p. 354, No. 52.

Many of the objections taken by the plaintiff's counsel in this case, seem to be founded upon the idea, that this is a suit prosecuted by William D. Branch, *as* administrator, &c., of Samuel E. Swilley, deceased. That however, is a wrong view of the matter. He prosecutes it in his own individual character. It is true, that in his affidavit, he, in order to show his right to the possession of the cattle in controversy, says he is entitled to the possession of them, *as* administrator of Samuel E. Swilley, deceased, and in his declaration, he alleges that they belonged to, and were owned by Samuel E. Swilley, deceased, in his life time, and at the time of his death, "and that they were in possession of the said plaintiff, administrator as aforesaid, of Samuel E. Swilley, deceased," and in all the proceedings, except the affidavit, he either designates himself as William D. Branch, or as William D. Branch, administrator; the latter is mere *descriptio personæ*. He had a right to sue in his individual capacity. Mr. Williams in his able work on Executors, vol. 1, page 627, (side,) says, upon the death of the testator or intestate, if an injury is afterwards done to his goods and chattels, the executor or administrator may bring an action for damages for the loss; and under the circumstances, he has his option either to sue in his representative capacity, and declare as executor or administrator, or to bring the action in his own name, and in his individual character; and Carlisle vs. Beesley, 3 Greenleaf's Reports, 257; Patcher vs. Wilson, 4 Hill, N. Y., 57-8 B. Monroe's Reports, 521; Hollis, et al. Administrator, vs. Smith, 10 East. Reports, 293, and Ballane and

Wife, Administrator vs. Spencer, 7 term Reports, 358, are all to the same effect. In Watson vs. Pilling, 2 Bro. & B., 446, it was held that on *general process,* the plaintiff may declare against the defendant, *as* executor or administrator, and where the affidavit, (to hold to bail,) stated the debt to be due to the intended plaintiff *as* executor, but the process was *general,* the Court of Exchequer refused to order the said bond to be cancelled. Chitty's Plea Ed., 1840, page 251. And see Duval vs. Craig, et al. 2, Wheaton Reports, 545; 4 Peter's Conds Reports, 29.

In 2 Williams on Executor's, side pages 1150 and 1151, it is said that the same declaration which contains counts on promises to the testator, may contain a count on an account stated with the plaintiff *as* executor, concerning money due to the testator from the defendant, or concerning money due to the plaintiff *as* executor, or a count for money lent by the plaintiff *as* executor, or a count for money had and received by the defendant to the use of the plaintiff *as* executor, or a count for money paid to the use of df't by the plaintiff *as* executor. So in a declaration in debt, a count on a judgment recovered by the plaintiff *as* executor, may be joined with counts on debts which have accrued to the testator. But (he says) it must be stated in the count, that the duty accrued to the plaintiff in his representative capacity of executor. It is not enough to say it accrued to him 'executor' or being 'executor,' *it must* be *averred* that it accrued to him *as executor.* And in Needham vs. Croke, Freeman's Reports, 728, it is said: "if an executor states an account with a debtor, he may, if he pleaseth, afterwards sue in his own name for this debt, for the stating of the amount raiseth a new debt.

he may sue *as executor,* as to naming themselves
ıtors, it is only to deduce their rights *ab origine;* yet
:theless, the cause of action arises entirely in his time,
since the death of the testator. And see 1 Salkeld, 207.
is an answer to the allegation, that there is no bond
ı binding the estate. The suit being by William
ranch, in his individual character, it is not necessary that
: should be; indeed it does not seem to be necessary
e the executor or administrator *as such,* brings a writ,
plevin. The statute declares that the plaintiff, or some
· competent person in *his behalf,* shall execute the bond
good and sufficient security. It does not contemplate
he latter provision that the persons signing the bond,
bind any body but themselves. In Pinney vs. admin-
tors of Johnson, 8 Wendell, 500, the court said: "It
s to be well settled upon authority, that a judgment
a bond or other security, given by an administrator
:ecutor, though in his *representative character,* does not
the estate, that the discription of the defendants in the
as executors, is surplussage, and they are chargeable
such a bond and judgment in their own right; it is
ı legal debt or judgment against the estate, and cannot
leaded as such. Citing Seyer vs. Smith, 1 Dall, 247
)d. Reports, 225 *ib.* 254, Croke Eliz. 406, 9. Coke, 93,
ass. 58, and 8 *ib.* 199, (where this doctrine is very ela-
:ely discussed,) 1 M. and S., 395, 7 Taunton, 580
8 Johnson, 120. It seems very doubtful, therefore
.east,) whether even in such an action as this, if the
llant had proceeded *as.* administrator, he could
executed a bond that would have bound the es-

It is said further, that the bond does not contain a description of the property. The Statute (see Thompson's Dig. 388,) does not require that it should. It only requires that the affidavit should describe it. This it does. Again it is said that it is not in double the value of the property as *alleged in the declaration.* The Statute only requires "a bond with good and sufficient security in at least double the estimated value of the property to be replevied, conditioned &c. &c., to be approved by the clerk" whose duty it is to see that a good bond is filed before he issues the writ. The estimated value of the property must therefore be ascertained before the declaration is filed, and the plaintiff cannot afterwards, by putting a higher value upon it in his declaration, invalidate his bond, and it would not be very safe for the defendant if he could. It is said again, that the jurat to the affidavit is defective, and that the bond is not approved as required by the Statute This is because the officer who put his jurat to the affidavit, and approved the bond, signed merely "Robert Bullock Clerk," and it is urged that this does not show that was Clerk of Marion Circuit Court where the suit was stituted. But it appears from the record, that the affivit was made, the bond executed, and the writ issued the same day, and in his test of the writ, he describes himself as Robert Bullock Clerk of the Circuit Court for Marion County. And the affidavit and bond were both filed the office of the clerk of that court on the same day they were made and executed, and it has not been alleged pretended that there was or has been any other action replevin between these parties in that court. It seem therefore, that there could be no difficulty in

fying all these proceedings as connected with each other in this suit, and it not being denied (or pretended here) that he was such clerk, (a matter of most easy ascertainment) we are clearly of opinion that the objection in regard to these matters (if in time) could not be sustained. In Whaling vs. Shales, 20 Wendell 673, M. T. Reynolds for the defendant moved to set aside proceedings in replevin, on the ground that there was only one security to the bond to the sheriff, citing 2, R. S. 527, Sec. 7.—R. W. Peckham for the plaintiff insisted that the remedy was by exception, not by motion. *By the court,* Bronson J. The proceedings are irregular when there is only one security, (citing 18 Wendell, 581, and 19. *ib.* 632,) and it is going quite far enough to save the action, by allowing an amendment on payment of the costs of the motion. The proceedings must be set aside unless the plaintiff execute a sufficient bond nunc pro tunc and the securities justify. The case referred to in 19 Wendell 632, is Howley against Bates. In that case no penalty was inserted in the bond; and it had but one security, and an amendment was allowed. In Newland vs. Willetts 1 Bart 20, it was also held that "where a replevin bond originally given is defective, a new bond may be filed *"nunc pro tunc."* If this be sound law, and we are at a loss to see why it is not, then this suit should not have been dismissed for the insufficiency of the bond (had it been defective) if the plaintiff was ready and willing to give a new and sufficient one, *'nunc pro tunc."* It may be very doubtful how far the non approval of the bond would affect its validity. In South Carolina it has been held that where a Statute requires the Sheriff to give bond to the Treasurer of the State, yet a bond to the Commissioners of

the treasury was valid, and where the same Statute requires that Sheriff's bond should be approved by those Commissioners, before it should be accepted, and it was approved by two only, it was held that this neglect of the Sheriff could not be pleaded in bar of a suit against him for official mis-conduct. 2 McCord 107. And in King vs. Gibbs 26 Wendell, it was held that it does not lie with the defendant (in a suit on such a bond) to object that the security was not approved by the Commissioners, that, the waiver of approval was injurious to the plaintiff if any body, that benefit they had a right to waive *quilibet potest renunciare jiri pro se introducto.*" But it is not necessary for us now to decide this point as we deem the approval under the circumstances sufficient, especially as more than a year had elapsed after it was executed and filed, before any objection was made to the sufficiency of the bond at all, and it does not appear that any objection was ever made to it on this ground until the present term of court. If therefore, the objection had it been taken in time, had been valid it now comes too late. It has been often held that if a Sheriff voluntarily gives bond with sureties in a larger penalty than is prescribed by the Statute, they will be held liable for the breach of it. Stevens vs. Treasures 2 McCord 107, and U. S. Dig. p. 442, No. 205, where Governor vs. Matchlock, 2 Hawks, 366. Johnson vs. Gwathmy 2 Bibb, 186. Treasures vs. Bates, 2 Baily 362, and Stevens vs. Treasures, 2, McCord 107, are cited. So, if a bond is given in a penalty *less* than the Statute prescribes. Grimes vs. Butler 1 Bibb 192. 1 U. S. Dig. p. 442, No. 206. It was also held by the court of appeals of Kentucky that where an execution was endorsed

security of any kind to be taken" the officer has authority to take a forthcoming bond, and if he ɜ, it will not be valid as a statutory bond, although ıay be good at common law as a protection to the offi-
7 B. Monroe's Reps. 289, 2 U. S. Dig. p. 59, No. 91.
l in Virginia it was held that "though a bond be not l as a statutory bond, it may be good at common law. nson vs. Merriweather 3 Call 523. And in Maine it was l that a statutory bond to be good as such, must be litioned and executed according to all the requirements he statute. But if it was not, it may be good at com- ı law. Howard vs. Brown 8 Shepley 358, 2 Supp. U. Dig. 307 Nos. 34 and 35. And in New York, that a d is not void merely because it does not in all respects form to the statute under which it was taken. It is olutely void only when the statute declares it void. ı Deusen vs. Hayward 17 Wendell 67. King vs. Gibbs Wendell 502. These cases are sufficient to show that h objections are not favored by the court. But the fol- ing are perhaps more conclusive. A replevin bond ing been forfeited, by reason of the suit in the superior rt not having been prosecuted with effect, it was held the case of Stomfield vs. Halloway, 11, Eng. Law and y. Reps. 559, that the bond though irregular, was not l, and that the plaintiff might sue upon it as a voluntary d. And in Butler vs. O'Brien, 5 Ala. 310, it was held t "a bond giving as a forthcoming bond, though not d as a statute bond, it being payable to the sheriff tead of the plaintiff, is good as a common law bond. 1 S. Digest, p. 327, No. 481. And in Speake et al vs. U. tes 9 Cranch 28, 3 Peters Cond. Reps. 248, the court

held that a bond taken by virtue of the embargo law of 1808 is *not* void although not taken pursuant to the statute; there being no allegation or pretence that the bond was unduly obtained, *colo officii,* by fraud, oppression, or circumvention, it must therefore be taken to have been a voluntary bond. And in spite of all the objections made against this bond, even if it were not good under the statute, we believe it would be a good bond at common law, but we see no objection to it under the statute.

It is well settled however, that bonds of this kind, will in general be sustained as voluntary bonds good at common law, unless the statute has expressly declared them void, or they have been obtained by fraud or by coercion or oppression *colore officii.* Nothing of this description has been alleged or pretended in regard to the bond under consideration.

It was insisted that the court has no authority to grant a pluries writ, that there was no declaration filed and the cause stands dismissed by the rules of the court, and Thompson's Digest p. 457, Sec. 6 and page 387, Sec. 3 are cited to sustain the proposition. This objection is founded upon this provision of the statute above cited at p. 389, Sec. 3, of our replevin law viz: "If the goods and chattels specified in the writ of replevin be not delivered to the plaintiff, and the defendant shall have been duly summoned, the plaintiff may either sue out an alias writ, or proceed by filing a declaration in trover or trespass, and thereby abandon his action of replevin." The writ in this case was returned not executed &c., and the plaintiff caused an alias to be issued which was also ineffectual, and he

caused a pluries to be issued which was executed.
s been urged that the court had no "authority to grant
ries writ." We entertain no doubt but that the plain-
ıight have caused such writ to be issued, without an
of the court, and until this writ was returned exe-
, he was not bound to file his declaration. This is a
lial statute, and should be literally construed. In-
as it is but an extension of an old common law reme-
'e need not perhaps invoke that principle to sustain
position. By suing out an alias writ the plaintiff
d (for the time being at least) his right to declare in
: or trespass. Whether if his pluries writ had also
d ineffectual he could have fallen back upon that
, as a last resource, is a question that may more pro-
be decided whenever it shall be directly pre-
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on the whole, our view of this matter is, that the
tiff had a right to declare in his representative
cter *as* administrator, or in his own individual char-
It seems that he adopted the latter course; that the
vit and bond are substantially good, that whatever
ılarity may have existed in them, are cured by the
tions to them not having been taken in due time
is as the books say, in the first instance; that therefore
rst two errors assigned are not well taken, and con-
ntly the *last* became immaterial.

t the judgment and order of dismissal of the court be-
ɔe reversed with costs, and the case be remanded to
court, and be there reinstated, that such proceedings

may be had therein, as to right and justice shall appertain, not inconsistent with this opinion.

SAMUEL L. BURRETT, APPELLANT, VS. MARIA DOGGETT, APPELLEE.

1. When in an action for use and occupation, the lot, square, town and county where the premises are situated, are set out in the declaration; *Held, first*, that this was a matter of discription and must be proved as laid; *Second*, that it was unnecessary to have alleged any location of the premises; *Third* that if it had appeared to have been the intention of the plaintiff to have made the averment of the place where the premises were situated, refer to the venue, or if it was doubtful, whether the design was to make the averment matter of discription or matter of venue, it would be considered as venue, in order to prevent a failure of recovery, because of the unnecessary averment, but when there is no such doubt, the averment must be considered as matter of description and must be proved as laid.

4. All averments in a declaration which need not be made, or proved when made, may be stricken out or disregarded in the proof, except when they touch the identity of that which is necessary to be proved. When they go to fix the identity, they become matters of description and must be proved as laid.

Appeal from a judgment of Duval Circuit Court. For the facts in the case, reference is made to the opinion of the court.

McQueen McIntosh, for Appellant.

Philip Fraser and Felix Livingston, for Appellee.

Hon. T. F. King, Judge of the Southern Circuit (who sat in this case in place of Douglas, J., disqualified,) delivered the opinion of the court.

The appeal, in this case, is from a judgment rendered in the Circuit Court of Duval county, in which Maria Doggett was plaintiff and Samuel L. Burritt defendant. The declaration contains two counts, the first for use and occupation, and the second for an account stated. The first alleges the use and occupation, by the defendant, "of a certain messuage, tenement and premises, situated on a certain lot in the town of Jacksonville, in the county of Duval, State of Florida, and known on the plan of said town as lot number six, in square number one, with appurtenances." Accompanying the declaration is an account with two items, the first charging indebtedness by the defendant to the plaintiff, for rent of house used as an office, May 1st, 1847," and the second, "for rent of same from 1st May, 1847, to 19th May, 1849." The pleas are the general issue and the statute of limitations. The facts, according to the statement agreed upon by the attorneys of the parties, are as follows: "that the amount of the rent rendered in the verdict, was proved to be due for rent of a house in the town of Jacksonville, but that the further description of lot number six, in square number one, in said town, was not proved, there being no evidence on that point."

At the trial, the defendant's counsel asked for this in-

verment would be considered as venue, in order to prevent a failure of recovery, merely because of the presence of unnecessary statements. There is nothing, however, to create the impression that such was the design. There is no doubt from the plain reading of the declaration, that the intention of the plaintiff was to specify the identical house, for the occupation of which she claimed rent. No clearer terms could have been used to express such a purpose. It is not only alleged that the premises were located in the county of Duval, and the town of Jacksonville, the only designation that can be construed as referring to the venue, but the very square and lot on which they were situated, are pointed out. The object seems to have been to leave no room for doubt with the defendant, as to the house for which he was called upon to pay rent.

We cannot, therefore, consider the averment of the location of the premises as referable to the venue, and the question next arises, was it necessary to have enabled the plaintiff to recover, for her to have proved the unnecessary allegation that the house was on the lot and square specified in the declaration, or was the proof of any messuage whatever belonging to her, sufficient?

A division of the averment contained in pleadings, is into matters of substance and matters of description, which require different degrees of evidence to sustain them. The former may be substantially proved, but the latter must be strictly proved, and in some cases with literal precision.

Allegations fixing the identity of that which is legally essential to the claim, can never be rejected. 1 Greenleaf, Ev. p. 126. Purcell vs. Macnamara, 9 East, 160. This case, in East furnishes an example of matters of substance, and

the proof required for them. The defendant was sued in an action on the case for malicious prosecution. The plaintiff alleged in his declaration that he was acquitted at a certain term of the court, when it appeared from the record that he was acquitted at another term. The variance was held to be immaterial, because the time when the judgment was rendered, was not laid in the declaration as part of the description of the record of acquittal. A similar case is that of Stoddard vs. Palmer, 3 Barn. and Cres. 2, where a Sheriff was sued for a false return to a fieri facias. The declaration stated that the judgment on which the writ issued, was rendered at one term, when the record showed a different term, and this was held no variance. In these cases, it was regarded as immaterial whether the judgment passed at the term mentioned in the declaration or not, because the suit was not brought upon the judgment. The reference to the judgment was only inducement to the principle matter, which in the one case was the acquittal of the plaintiff before he commenced his action, and in the other, the false return. Therefore the statement of the term of which it was rendered was superfluous, and no proof was necessary. But if the judgment had been the subject matter of the suit, it would have become the principal matter, and must have been proved precisely as laid in the declaration. The statement of the time of its rendition, would then have been descriptive of the identity of that which it was essential for the plaintiff to prove, and if it had not been proved exactly as set out in the declaration, the variance would have been fatal. Another case illustrating the rule as to matters of substance, is that of

Bowless vs. Miller, 3 Taunt., 137, where an action was brought for an injury to the plaintiff's residuary interest in land, and he alleged that the close, when injured, was and "continually from thence hitherto, hath been and still is" in the possession of a third person. This latter part of the averment was held superfluous and not necessary to be proved. It might as well have been stricken out, for it did not affect the claim either by adding matter of substance or description.

Other cases in the books show the decree of proof required in averments of descriptions. Cudlip vs. Rundle, Carth. 202, was an action by a lessor against his tenant for negligence, &c. A demise of seventy years was alleged, when the proof was of a tenancy at will. The variance was held to be fatal. It was requisite to have alleged some tenancy, and one generally was sufficient, yet the plaintiff having unnecessarily identified it by describing the precise term, he was bound to prove it as laid.—Another case is that of justification in taking cattle damage feasant, Dyer, 365, where the allegation of a general freehold title was sufficient, but the defendant without any necessity for it, alleged a seisin in fee, he was held to the proof of a seisin in fee because it was descriptive and limiting that which it was necessary for him to aver and prove, to wit: a freehold title. In Savage vs. Smith, 2 W. B., 1101, an officer was sued for extorting illegal fees on a fieri facias. Here it was required to allege only the issue of the writ, but the judgment on which it was founded, was also set out. The plaintiff was

required to prove judgment as he had stated it, because it particularized the principal thing, the fieri faceas.

The rule extracted from these and other cases in the authorities, upon the subject of variance, is that all averments in a declaration, which need not be made or proved, when made, in order to entitle the plaintiff to recover, may be stricken out or disregarded in the proofs except when they touch the identity of that which is necessary to be proved. When they go to fix the identity, they become matters of description and must be proved precisely as laid. The object for which the rule is established is to effect the same purpose as a declaration, that is, to warn the defendant of the claim or charge which is sought to be made out against him, and to enable him to plead the judgment in bar of a second suit, for the same thing. We think the rule is sound and well calculated to effect the end of justice. It looks to the same purpose with that intended by the rules of special pleading, which we have adopted, that is, to make the one party fully informed of the demand against him, and the other of the defence he is to meet, so that neither may be surprised or unarmed in the contest which is about to ensue.

How does the rule bear on the case before us? The plaintiff alleges the use and occupation by the defendant of a "messuage, tenement and premises," but not stopping here, she makes the further unnecessary averment, that the messuage, &c., were situated on a particular lot and square in the town of Jacksonville, and county of Duval, thereby pointing out with as much precision as possible, the particular messuage, for the use of which she sues. This averment goes to fix the identity of that which was before aver-

red, and which it was necessary to aver and prove, to-wit: a messuage belonging to her, and thus it becomes matter of description and falls within the rule. The situation of the premises as described in the declaration should have been proved, or else the verdict should have been for the defendant.

A bill of particulars could not have been required in this case, as the identity of the house, was already by the terms used in the count as apparent as any words could have made it. But if the averment had been in the general terms used in such actions, "messuage and appurtenances" only, and the defendant had called for a bill of particulars, to which he would have been entitled, and the specification of the property had been the same as in the body of this declaration, she could have no more recovered for the rent of another house, than she could have recovered for other goods, than those specified in the items of a bill of particulars, attached to a common count for goods sold.

It is with much reluctance that we feel constrained to reverse the judgment in this cause. It is hard upon a plaintiff to be defeated or delayed in collecting a claim, which from the evidence and the finding of a jury, appears to be just, on account of inadvertence arising probably from the hurry and excitement of a trial at nisi prius. But satisfied as we are, that the rule of evidence as we have laid it down, has been long established, and that a departure from it, might prove injurious, by unsettling forms of pleading and rules of evidence well known and commonly used, we cannot direct a shorter course by which the plaintiff may obtain her claim than a new trial.

Let the judgment be reversed and a new trial awarded and the cause remanded for further proceedings, not inconsistent with this opinion.

Decisions

OF THE

Supreme Court of Florida,

TA

MARCH TERM, 1855,

Held at Tampa.

BENJAMIN HAGLER, APPELLANT VS. JOHN MERCER, APPELLEE.

1. Where a plea is required to be verified by an affidavit, the failure to append the affidavit, is not a ground of *demurrer*. The subject can be taken advantage of, only by motion to the court to set aside the plea, or to sign judgment as for want of a plea.

2. The twenty-fourth section of the act of November 23d, 1828, (Thomp. Dig., 331,) is restricted to pleas alleging a *want* of consideration, and does not apply where the allegation is a *failure* of consideration.

3. And even where the *want* of consideration is pleaded, the only effect of that section is to change the burden of proof. The defendant may still plead a

want of consideration, without verifying his plea by an affidavit; but in such case, he takes upon himself the *onus probandi*, as he formerly did at common law.

Appeal from a judgment of the Circuit Court, for Hillsborough county.

James Gettis, for appellant.

J. B. Lancaster and Glover, for appellee.

DuPONT, J.

This was an action of assumpsit, brought in the Circuit Court of Hillsborough county, by the respondent against the plaintiff in error, upon a promissory note. The defendant below filed a plea, in which he alleges a total *failure of consideration*. To the plea there was a demurrer, and the special ground therein assigned was, that the plea was not put in on oath, as required by the statute. The demurrer was sustained and judgment final was entered for the plaintiff. From this ruling of the court, the defendant appealed, and the only point presented for our adjudication is in regard to the correctness of that ruling.

The first question that arises upon the consideration of this demurrer is, whether the objection to the plea is such an one as may be reached by demurrer.

There are some well founded objections to pleadings which cannot be the ground of demurrer; such are principally the non-compliance with some rule of practice, not affecting the substance of the pleading. Thus in the English courts, under the operation of the new rules, if the *venue* be repeated in the body of the declaration, the defendant cannot on that account demur, but if taken advantage of, it must be by motion to strike out the objectionable venue. So also an inaccuracy in the form of commencing

a declaration, is not ground of demurrer. 1 Chitty's Pleading, 662.

The point under consideration not unfrequently arises in the English courts, under the operation of the statute of 4 Ann., C., 16, S., 11, which provides that "no dilatory plea shall be received in any court of record, unless the party offering such plea, do by affidavit prove the truth thereof," &c. In such case, if the party fail to support his plea by affidavit, the invariable practice is, to treat the plea as a *nullity* and sign judgment, or to move the court to set it aside. 1 Chitty's Pleading, 462. As the demurrer admits the *facts* pleaded, and merely refers the question of their *legal sufficiency* to the decision of the court, we are very clearly of the opinion that the objection made to the plea, can be taken advantage of *only by motion to strike out.* This point was not noticed at the argument, but as a matter of practice, we esteem it of sufficient importance to be settled.

The next point arising in the case, and which indeed was the only one argued at the hearing, involves the construction to be given to the twenty-fourth section of the act of November 23d, 1828, (Thomp. Dig., 331 Art., 1 Par. 4,) which provides that it shall not be necessary for the plaintiff to prove the execution of any bond, note or other instrument of writing, purporting to have been signed by the defendant nor the consideration for which the same was given, unless the same shall be denied by plea, put in and filed as aforesaid, that is, "put in on *oath,* and filed before the cause is called on the appearance docket."

It is contended for the respondent, that under the operation of this provision of the statute, the plea in this case,

alleging a *failure* of consideration, ought to have been verified by an *affidavit,* and that without such affidavit, it was wholly defective as a defence. This provision of the statute, has never, heretofore, received an authoritative adjudication, but upon a careful consideration of the subject, we have no hesitancy in deciding that the position urged, cannot be maintained. It will be perceived by reference to the phraseology of the section, that the requirement of the oath is confined to a plea denying the *"execution"* of the instrument, or the "consideration" for which it was given. In other words, the plea is required to be verified by oath, when it alleges that there was *no* consideration; but the same requirement is not applicable, where it simply alleges that the consideration had *failed.* And we think that there were sound reasons for thus restricting the application of the section. In the majority of cases, it would be extremely difficult for the holder of these instruments, to prove affirmatively, the consideration for which they were given, (as would have been required to have done at common law, except in the case of bonds,) but not so as to the *failure* of the consideration, that is a matter much more easily proved, and therefore the statute left it as it stood before the passage of the act. By the 3rd and 4th Ann, promissory notes and bills of exchange were made negotiable, they imported a consideration, and it was not necessary that the holder should prove the same. If the maker desired to attack the considera-

tion, he must do so by an affirmative plea, alleging either a *want* or *failure* of the same, and he thereby took upon himself the *onus probandi.* Our statute has modified the common law rule upon this subject, so far as it relates to the want of consideration, but has not altered it where the defence is a *failure* of consideration. But even in the former case, the only effect of the statute is to change the burthen of proof; the defendants may still plead the want of consideration, without being required to verify his plea by oath, but in such case, he takes upon himself the burthen of proof, as he formerly did at common law.

It is true that in the *proviso* to the twenty-fourth section, it is said "that nothing in this act shall prevent an executor or administrator from denying the execution aforesaid, or from pleading a want or *failure* of consideration, if he shall give in writing, reasonable notice of such intention to the plaintiff," his agent or attorney, and this proviso has been construed to exempt them from the operation of the requirement contained in the body of the section, which imposes the necessity of an oath. From this it has been urged that the section was intended to apply as well to the plea of a *failure* as of a want of consideration; but the statute being in derogation of the common law, although partaking somewhat of a remedial character, it must not be so construed as to enlarge its operation.

Let the judgment be *reversed,* and the cause remanded

to the court below, for such further proceedings not inconsistent with this opinion, as may be appropriate.

ROBERT GAMBLE, APPELLANT, VS. CAMPBELL APPELLEE.

1. A court of equity will not enjoin a judgment at law and grant a new trial in case of negligence and inattention of a plaintiff to the defence of his suit.
2. It is not proper to dissolve an injunction or dismiss a bill for want of a suitable bond for costs or for insufficient notice or non-payment of costs; the court should correct the error if possible, without resort to this alternative.

Appeal from a decree of the Circuit Court for Hillsborough county.

J. T. Magbee for appellant.

J. Gettis for appellee.

BALTZELL, C. J.

This is a suit instituted in equity by the complainant Gamble to enjoin a judgment at law recovered against him, and to obtain a new trial.

Defendant demurred to the bill, insisting that there is not sufficient equity in it to entitle complainant to relief.

The basis of the complaint is the excessive charge by defendant for work done to the machinery of complainant at his sugar plantation. He alleges that the work executed ought to have been performed in fourteen or fifteen days, according to his estimate is worth about seventy five dollars, whereas the judgment of the court is for two hundred and twenty five dollars; in addition to this that there was an agreement for arbitration and to dismiss the suit, which not having been done, he was wholly unprepared for trial, and judgment was rendered against him without defence.

The first point is as to the charge for the work, and here it is obvious that the averments are very vague and indefinite. We are not informed what work was done nor the character nor extent of it, nor whether it required skill or was ordinary kind. We are only told that it it ought to have been performed in fourteen or fifteen days, and the engineer selected as referee made his estimate by the extravagant charges made against Government in the Indian War. In cases of this kind there should be specific and definite statements to satisfy the court that injury and injustice have been done, especially where knowledge of the subject matter can scarcely be supposed to be in its possession. That this is indefinite, it is only necessary to say that the denial of these statements presents no issue, and their ascertainment brings us no nearer to a conclusion as to the merits of the contest than without it. The merits of the case depend upon this position for if the judgment is not for too large an amount then complainant is not injured.

Whilst we are of opinion that the allegations do not

make out a case in this respect entitling the complainant to relief, we proceed to the other charge of surprise in the respondent's not dismissing the suit at law, and his taking judgment contrary to agreement.

We are by no means satisfied from the statement in the bill that there was such agreement; on the contrary incline to the opinion that there was not, whilst an arrangement is stated to have taken place between the friend of complainant and defendant, the terms of which are narrated to the effect that an engineer was to be the referree, that items were to be furnished, witnesses and evidence to be produced, one hundred and fifty dollars to be paid to defendant, the bill proceeds as follows:

"That after these interviews with said Braden the friend of complainant it *was understood* that the suit at law was dismissed, and said Braden left the place Tampa, considering the matter of the suit settled, and that the arrangement for the reference was acceptable to all parties." If the dismissal had been part of the contract it was easy to have so stated, but there is nothing of the kind, and we are informed that after the arrangement was made, it was understood, with whom or by whom is not said, that the suit was to be dismissed. The importance of this fact is too obvious in its effect on the suit to allow a vague and imperfect allegation of this kind, to have the weight of a positive and definite charge, so that we are constrained to believe that no such agreement was made.

Passing from this point we do not perceive even that an agreement for a reference was made. The allegation that the friend of complainant agreed to a reference is not

sufficient, unless authority was shown and alleged from complainant or his adoption of it afterwards, established.

If it had the sanction of complainant he admits he did not perform, but forgot, one of its main provisions, the payment of one hundred and fifty dollars to secure performance of the reference, and that he altogether failed to attend to the reference either by being present or having witnesses &c. present. It is true the latter is attempted to be excused by pressure of other business, yet the whole statement shows conclusively, that defendant acted prudently in not dismissing his suit, and in not relying upon the parol engagement of complainant's friend to adjust the matter by arbitrament. The whole case is fertile of omission and neglect of this character. Complainant is sued and is indebted to the kindness of a lawyer who volunteers to prevent a default by entering his name at the first term; another friend volunteers to arrange the case by reference, but he neither complies with the terms of reference nor does he attend the trial of the case before the referee, nor does he regard in any degree the suit at law. Here also no defence is made, and judgment is rendered necessarily in his absence. The result of all this is that by the award of the referee and the judgment of the court both, he is declared indebted in about the same sum. Under such circumstances it would be extending the powers of a court of equity to a most unprecedented extent, indeed paying a premium to indifference and inattention to allow his suit to be successful. Complaint is made of the credit directed by the court injurious to complainant, but we think without propriety. The credit is directed of the date of

the judgment although made of a latter date, so that the injury is to defendant.

We do not concur in the view of the court as to the dissolution of the injunction. A bill should not be absolutely dismissed or the injunction dissolved for deficient injunction bond for non-payment of costs or for want of notice. The plastic and salutary power of the court of equity is exerted to amend and correct, rather than by adopting the harsh and severe rules and maxims of the common law courts, to dismiss and turn the parties out of court. The injunction was properly dismissed for want of equity.

For these reasons we are clearly of opinion that the plaintiff has not made a case entitling him to relief, and his bill was properly dismissed.

The decree will therefore be affirmed with costs.

WILLIAM B. HOOKER, PLAINTIFF IN ERROR, vs. JOHN GALLAGHER, DEFENDANT IN ERROR.

1. A promissory note, payable to A. B. or *order*, must be endorsed by the payee to enable the holder (other than the payee) to sue upon it *in his own name.*

2. A declaration upon such a note by a holder, other than the payee, is defective in substance if it does not allege that the note was endorsed.
3. A demurrer opens all the pleadings, and the court should give judgment against the party who committed the first error (in substance) in pleading.
4. It is error for the court to give a judgment by default as for want of a plea when there is a good plea in the case upon which issue has been joined.
5. When the plaintiff declares in assumpsit on a promissory note, he cannot properly be permitted to give in evidence, a sealed instrument as the foundation of his action.
6. The copy of the cause of action required by the statute to be annexed to the declaration, is no part of the declaration and cannot be reached by demurrer.

Writ of error to the Circuit Court for Hillsborough county.

J. T. Magbee, for Plaintiff in Error.

James Gettis, for Defendant in Error.

DOUGLAS, J.

This case was brought up by writ of error from Hillsborough circuit court, where John Gallagher, the defendant in error, brought suit against Wm. B. Hooker, the plaintiff in error, upon a promisory note for "the sum of eighty dollars," alleged to have been made by him, payable to one Thomas Weeks or order, and by the said Thomas Weeks, sold and delivered to one William Butler, who sold and delivered the same to the plaintiff.

It is not alleged in the declaration that the note was endorsed, either by Thomas Weeks or Wm. Butler.

Annexed to the declaration is a copy of a single bill of the same date and amount, as the instrument described in it, and prefaced by the words, "*copy of note.*"

The defendant demurred to the declaration, and alleged as causes of demurrer: *First,* That plaintiff cannot sue on

the note, it not being endorsed; *Second,* The note being payable to order, is not negotiable without its being endorsed; *Third,* Copy of the note shows that there is no endorsement; *Fourth,* Plaintiff cannot maintain suit on the note as copied in the declaration. This demurrer was, after argument, overruled by the court. Whereupon, the defendant put in three pleas: *First,* The general issue; *Second,* That the note was transferred by William Butler to plaintiff after it had become due and payable, and at the time it was transferred to plaintiff, by the said Wm. Butler the defendant held two (certain) promissory notes against the said Wm. Butler, which were transferred by one C. A. Walker, to defendant, of which plaintiff had notice, alleging further, that at the time of the transfer of said notes, the said Wm. Butler was indebted to the defendant, upon one of them, thirteen dollars and sixty-two and one-half cents, and upon the other, seventeen dollars and sixty-four cents.

The last plea alleges an indebtedness of the plaintiff to the defendant at the time when this suit was instituted, for money had and received by the plaintiff of the defendant, and for other money upon an account stated, amounting in the whole to one hundred and sixty dollars, offering to set off the said several sums, and concluding as in an ordinary plea of set-off. To the *second* plea the plaintiff demurred. To the *first* he joined issue, and replied to the *third.*

The plaintiff sets forth as cause of demurrer to the *second* plea, that the promissory note on which this suit was brought was payable to Thos. Weeks, or order, and the said Thos. Weeks, transferred the same to said Wm. But-

ler, and the said Wm. Butler transferred the same to the plaintiff, and therefore, the defendant hath no legal right to set up any debt that existed between him and the said Butler, as a set-off in this suit, and because the said plea is not responsive to the declaration, in this, that it does not set forth, that said note was made by the defendant, and payable to Thos. Weeks or order.

The demurrer, which by its term was confined to the *second* plea, was sustained. The order is as follows, viz: "On hearing argument on the demurrer to the pleas herein made and filed, the court sustains the said demurrer." After which the plaintiff by his counsel moved for judgment by default, as for want of a plea, which motion was sustained and an order was entered that the clerk assess the damages and he having assessed them at the sum of eighty-seven dollars and seventy-five cents, judgment was entered against the defendant for that sum.

The following errors are assigned, viz:

I. The court erred in overruling defendant's demurrer to plaintiff's declaration.

II. The court erred in permitting and hearing plaintiff's demurrer to defendant's pleas, after plaintiff had filed his replication thereto.

III. The court erred in sustaining the plaintiff's demurrer to defendant's plea of set-off.

IV. The court erred in not dismissing the plaintiff's suit after the plaintiff had demurred to defendant's pleas, because a demurrer opens all the pleadings, and the court is bound to give judgment against the party committing the first error in pleading.

V. The court erred in not dismissing the plaintiff's suit

after the demurrer to defendant's pleas, as stated in the fourth error, assigned for the following reasons, viz:

1. The plaintiff's suit was brought on a sealed instrument, and he did not set it out (as such) in his declaration.

2. There was a variance between the declaration and the note copied thereon.

3. Because the plaintiff had misconceived his cause of action, and brought his suit in assumpsit on a sealed instrument.

4. The court erred in permitting the note to be given in evidence, it varying from note declared on in the declaration.

It is proper for us to remark, that the last error assigned, (viz. the fifth,) relates to a matter that is not properly before us. This court has repeatedly held that the cause of action, a copy of which is required by the statute to be annexed to the declaration is no part of the declaration, and cannot be reached by demurrer.

If such a variance exists as is here alleged, the defendant when the note or bill was offered in evidence, might have objected to it on that ground, had his objection noted, (if it were not sustained,) and made the reception of the document in evidence, the ground of a bill of exceptions. Then it would have been legitimately before the court for its action, it is not now, we return, therefore, to those that are. And the first is that the court erred in overruling the defendant's demurrer to the plaintiff's declaration, and in this we agree with the counsel for the defendant and if he had relied upon this objection and permitted the judgment to stand upon his demurrer, we should have reversed it for that cause, as we consider the declaration *defective in*

substance, in not alleging that the note declared upon, which as we have seen was payable *to order,* was endorsed by the payee. If it was transferred, as is alleged in the declaration, the plaintiff might have brought suit upon it in the name of the payee for his use. (Chitty on Bills, Ed., 1842, page 204,) but not in his own name. The endorsement of the note was necessary to enable him to do that. *Ibid,* (note) p. 6, 201 and 204, notes and p 518.——And see 3 Kent's Commentaries, page 88, as to endorsements.

A promissory note payable to order, is a negotiable instrument, and must be endorsed to give the holder, (other than the payee,) a right to call on the maker for payment, or to bring suit against him *in his own name.* The defendant, however, did not rely upon this principle, but put in several pleas, in two of which he attempted to set off debts alleged to be due to him from one Wm. Butler, an intermediate holder of the note. These pleas were clearly bad, whether the note was in point of fact endorsed or not, as our statute of set-off, (Thomp. Dig., p. 347, sec. 2,) only allows a set-off between the parties to the action. The court therefore, was right in sustaining the demurrer to the second plea, but while doing this, it should have looked into the declaration, for we recognize the rule of law as laid down by the defendant's counsel, that a demurrer opens all the pleadings, and that the court should give judgment against the party who committed the first error in pleading, if the error be a substantial one. Chitty in the first vol. of his work on pleading, 707, says: "A party should not demur unless he be certain that his own previous pleading is substantially correct, for it is an established rule, that

ıpon the argument of a demurrer, the court will notwithtanding the ·defect in the pleading demurrered to, give udgment against the party whose pleading was first deective *in substance,* citing a great number of authorities in upport of their position, all of which, so far as we have xamined them, sustain it, and moreover, this court has reeatedly so held. And as the first error in this case was comnitted by the plaintiff, (in the court below,) the judgment ıpon the demurrer there, should have been for the defenlant, and here we might, perhaps, with propriety stop.

There are however, other errors in the record, which we leem it advisable to notice. The demurrer as before renarked is by its phraseology confined to the *second* plea, ı fact we think that could not have been brought to the ıotice of the learned judge who decided upon it, in the :ourt below; it was probably argued there, as it has been ıere, as though it extended to all the other pleas. Had :he judge understood that it was thus confined, and that :he plaintiff had joined issue on all the other pleas, he would not, we think, on motion of the plaintiff's counsel have given a judgment by default as for want of a plea, and ıave authorized the clerk to assess the damages.

The last plea was a plea of set-off, of an indebtedness oy the plaintiff to the defendant to which the plaintiff had replied, and this raised an issue for a jury to try.

Whether the plaintiff after filing his precipe, and causing his summons to issue in an action of assumpsit, could declare upon a "Single Bill," or as it is sometimes called, a note under *seal,* it is not necessary for us now to decide, but having declared upon a promissory note, we have no hesitation in saying, that he could not properly

be permitted to give such a document in evidence. They are very different instruments. The one is known to the law merchant, and is governed by its rules, having been placed by the statute of 3 and 4 Ann *chap.* 9, made perpetual by the statute of 7 Ann *chap.* 25, *upon the footing of inland bills of exchange,* (Bowie Ass. of Ladd vs. Duval 1 Gill and John, 175. Chitty on Bills Ed. 1842, page 518,) an act which should be most liberally construed being a remedial law, for the encouragement of trade. Milne vs. Graham 1 Bar. and Cres. 192. 2 dow. and Ry. 293. De La Chaunette vs. Bank of England, 2 Barn. and Ald. 385. The other is not known to the law merchant, and if governed by its rules to any extent, it is only by virtue of our statute which makes bonds and other instruments under seal assignable, and when duly assigned authorizes the assignee thereof to bring suit thereon in his own name. See Thompson's Dig. p. 348, No. 3. The judgment being erroneous, it must be reversed with cost, and the case be remanded to the court below, for further proceedings, not inconsistent with this opinion.

Decisions

OF THE

Supreme Court of Florida,

AT

MARCH TERM, 1855,

Held at Mariana.

HENRY AHREN AND HENRY HYER, APPELLANTS VS. GEORGE WILLIS, APPELLEE.

1. It may be laid down as a safe rule, that every presumption is to be in favor of the ruling of the court below, where the same is made in reference to any point, which at common law, was a matter purely of *discretion;* to induce the appellate court to control the discretion, it must be made manifest that injustice or injury has been done to the rights or interests of the party asking its interference.
2. Under the operation of "Reg. Gen." (Hill. Term 4. W. W.) which have been adopted for the regulation of the practice in the Circuit Courts,

where a defendant intended to rely upon either a want of consideration, or a failure, or illegality of consideration as a defence to the action, he shall set forth in his plea so much of the facts or circumstances connected with the transaction, as may be necessary to apprise the plaintiff fully, of the specific nature and character of the defence, which he will be required to meet.

Appeal from a judgment of Escambia County Circuit Court.

This was an action of debt brought by the appellee on a sealed note. The appellants who were defendants below pleaded *first, non est factum,* and *second* "that no consideration passed to said defendants whereon they could be charged by the said supposed writing obligatory," concluding to the county. To the second an affidavit of its truth was attached.

Upon the first plea issue was joined and to the second, plaintiff demurred, alleging the following as causes of demurrer.

1. Want of consideration is no defence to an action of debt on specialty.

2. That the plea is too general.

3. That it is not owned nor does it appear in and by the said plea, how and under what circumstances, or for what purpose the writing obligation in the declaration mentioned was made by the defendants.

4. That the said plea ought to have stated and shown affirmatively how there was no consideration or value for the making of the said writing obligatory by the defendants.

At June term 1854 the demurrer was sustained, and leave was granted to the defendants to plead over.

At October Term following, defendants applied for a continuance on the following grounds, viz:

1. The first call of the docket was made before the selection of the jury and on the calling over the docket the second time, defendants supposing it was not the pre-emtory call, were not ready with their case and the counsel of plaintiff insisted on a trial, and the Judge ruling the party into instant trial, the defendants were taken by surprise.

2. The defendants filed a bill for injunction on the first day of the term and entered a motion on the book, that a motion for an injunction would be made this day. When the case on the law docket was called the defendants asked it to be passed over till the motion for an injunction could be argued, it being set for the same day, which the court overruled. He believes that the injunction will be granted as soon as it is presented to the court. That this application is not made for delay but that justice may be done, and that they will be ready for trial at the next term.

The motion for continuance was overruled, Judgment entered for the plaintiff and defendants appealed.

W. Anderson and B. D. Wright, for appellants.

R. L. Campbell, for appellee.

DuPONT, J. delivered the opinion of the court.

The assignment of errors filed in this cause presents for our consideration two points 1st the propriety of the ruling in the Circuit Court; refusing to grant the motion of the defendants below for a continuance of the cause, and 2nd, the sufficiency of the defendants special plea to the plaintiff's declaration.

At common law, the granting or refusing of a motion for a continuance is a matter exclusively within the control, and dependent upon the discretion of the *nisi prius* Judge, and error could not be predicated thereon. Such was the practice in this court, until it was altered by the statute which gives to either party in a common law proceeding, the right to assign as error an interlocutory order, which may be made in the progress of the cause. Under the provisions of that act, this assignment of error has been made, and we are called upon to review the decision of the court on that point. In proceeding to perform that task, it may be laid down as a safe rule for the guidance of the appellate tribunal, that every presumption is to be in favor of the correctness and propriety of the ruling of the court below, where the same is made in reference to any point which before the passage of the act, was a matter purely of *discretion;* and that to induce this court to control that discretion, it must be made manifest that injustice or injury has been done to the rights or interests of the party seeking its interference.

The affidavit of the defendant, upon which the motion for the continuance was predicated, alleges that the party was *surprised* into trial, but the circumstances stated, do not in our opinion sustain the allegation. The entire gravamen of the complaint is, that the "parties" were not ready with their case, when the same was called for trial, without sufficiently showing *how* or why they were not ready. The only *issue* before the court at the time that the motion was made for the continuance of the cause, was upon the plea of *non est factum,* and there is no complaint that the parties were deprived of the benefit of any

evidence to support that plea, by the ruling of the court. The only allegation contained in the affidavit, which would even seem to tend to that point is, that the defendants had "filed a bill for an injunction on the first day of the term and had entered" a notice that a motion for an injunction, would be made; but we do not think that such a circumstance would afford any ground for the granting of the continuance, as the injunction, if proper to be granted could be obtained as well after, as before the trial at law. Besides, a continuance had already been granted to the defendants at the previous term of the court, and there was therefore less excuse for their not being ready to proceed in the trial, at the regular call of the docket.

Upon a careful consideration of all the facts and circumstances as set forth in the affidavit, we are very clearly of the opinion that the court below did not err, in refusing to grant the motion of the defendants for the continuation.

The second error assigned presents for our consideration the sufficiency of the special plea, alleging a *want of consideration* for the making of the instrument sued upon. The declaration was in debt upon a sealed note, or single bill, and in addition to the special plea before referred to, the defendants also filed the plea of *non est factum* Upon this latter plea issue was joined, and a demurrer filed to the former; there was a joinder in demurrer, and the ground insisted upon at the argument before us was that the plea was too general, being merely of a negative character, and that it did not set forth affirmatively the circumstances under which the instrument had been executed.

At common law, it is not permitted to a party to attack

the consideration of a sealed instrument in this mode where the instrument is made the foundation of the action. But our statute has altered the common law doctrine in this respect, and under its provisions, it may be now done, if the party defendant will support his plea by an affidavit. (Vide Thomp. Dig. 331, part 4.) The plea in this case was accompanied by the affidavit required by the statute, and if it had been properly pleaded, and the plea sustained by competent evidence, it would have afforded a complete defence to the action. We are of the opinion however, that the objection to the form of the plea as pleaded in the court below, was well taken, and that the court was correct in sustaining the demurrer, and ruling the defendant to plead anew.

Before the adoption of the new rules in England (Reg. Gen. Hill, T. 4. W. 4) pleas were much more general in their character than they are at this day. Under the old system of pleading, it was a rule admitting of very few exceptions, that no matter which amounted to the general issue, could be made the subject of a special plea. It was objected however, that as a consequence of the general character of the pleadings under that system plaintiff's were frequently surprised by the facts adduced in evidence at the trial, and to remedy that alleged defect, the new rules were adopted, which require, for the most part, that the facts intended to be relied on as a defence, should be circumstantially set-forth in the body of the plea. We have adopted these new rules, for the government of the Circuit Courts, so far as they are applicable to our system of jurisprudence, and the adjudications which have been made in the English Courts, in regard to these rules, will

commend themselves to our consideration as authority in the premises. The precise point now under discussion came up in the Court of Exchequer in England in the case of Easton vs. Prachett, (1 Comp., Meas. and Roscoe, 178,) and it was there decided that the plea of the defendant which merely alleged "that he endorsed the bill without having or receiving any value or consideration whatsoever, in respect to his said endorsement, and that he has not at any time had any value or consideration whatsoever in respect of such endorsement," was too general in its allegations to be in conformity to the requisitions of the new regulations. Lord Abinger, C. B., in delivering the judgment of the court, says in reference to the form and character of this plea, "it would have been held before the late regulations as to pleadings, as amounting to the general issue. The new regulations do not justify this form of plea. It was intended to make it encumbent to set forth the circumstances under which the bill is sought to be impeached. The plea of the general issue is forbidden by the new rules to be pleaded in an action on a bill of exchange, and the plea of a special matter, which according to the new rules is now to be pleaded, is not to be confined to the effecting the same purpose as a mere notice to prove the consideration. It was intended that the plaintiff should be apprised by the plea of the grounds upon which the defendant objects to the right of recovering upon the bill, as for example, that it was given for the accommodation of the plaintiff, the *onus* of proving which, lies upon the defendant, or that it was given upon a consideration which afterwards failed, which in like manner the defendant must prove, or that it was given on a gambling transaction; and various

similar cases may be readily suggested. The intention then of these regulations being to give the plaintiff due notice of the real defence which is to be set up, would manifestly fail, if such a general plea as the one in question could be sustained, because the plaintiff would be left in the same state of uncertainty in which he was, before these rules of pleading were introduced." The same point again came up for adjudication in the same court, in the case of Stoughton vs. Earl of Kilmorey, (2 Cromp. Meas. and Ros. 73) and the former decision made in the case of Easton vs. Prackett, was referred to as decisive of the question. In this latter case, Lord Abinger remarked, "This is a plea in the negative. The object of the rule of pleading was, that all these matters independent of the making of the promise, should be stated affirmatively, in order that the plaintiff might know from the facts stated, what he was come to try. A variety of circumstances might defeat the consideration; they ought therefore to be stated, in order that the plaintiff may know what he is to meet. All the advantages to be derived from the new rules as to pleading would be entirely lost, if this mode of pleading were to be allowed."

It is true, by a provision of our statute, the *onus* of proving the consideration in the cases of bonds, notes and bills of exchange (which ordinarily import a consideration) may be thrown upon the plaintiff, if the defendant will support his plea by an affidavit of its truth; but this circumstance, so far from operating to relieve the plea from the stringency of the new rules, is in our opinion a potent consideration why it should be applied with the greater particularity, in the practice of our courts.

The rule to be deduced from the authorities before cited, we take to be this, that where a defendant intends to rely upon either a want of consideration, or a failure or illegality of consideration, as a defence to the action, he shall set forth in his plea, so much of the facts or circumstances connected with the transaction as may be necessary to apprise the plaintiff fully of the specific nature and character of the defence which he will be required to meet.

The plea in this case was wholly and entirely of a negative character. The only allegation therein contained was, that "no consideration passed to said defendants wherein they could be charged by the said supposed writing obligatory," accompanied by no explanation of circumstances under which the same was executed, or statement of any of the facts connected with the same.

Upon a careful consideration of the point presented by the demurrer, we are inclined to coincide in the view taken of it by the English court, in the cases before cited, and to decide that the demurrer was well taken.

Let the judgment of the Circuit Court be affirmed with costs.

CHADLER C. YONGE AND HENRY BRYAN, APPELLANTS, VS. JOHN MCCORMACK, APPELLEE.

1. "Equity will enjoin the collection of the purchase money of land, on the ground of defect of title, after the vendee has posession under a conveyance from the vendor with general warranty, if the title is either posessed or threatened, or if the purchaser can shew clearly that the title is defective."
2. On a motion for injunction after answer, the court will look only to the facts that are responsive to the bill, and will presume against defendant when he has not answered when he ought to have answered.
3. Where a new equity is set up by the answer to avoid that set up by the bill the court will not regard it on the motion.
4. On a motion for an injunction, the court will not commit itself to points or questions that may arise at the final hearing.

Appeal from an order of the Circuit Court for Jackson County, sitting in Chancery. The opinion of the court embraces substantially all the facts of the case, to which reference is made.

McClellan, for Appellants.

A. H. Bush, for Appellee.

BALTZELL, C. J.

This is an appeal from a refusal of the court below to grant an injunction at the instance of the complainants, Yonge and Bryan. The application was after answer.—The case made out by complainants, is substantially as follows: That they bought from defendant a tract of land, lying at the head of St. Andrews Bay, for a town site, hoping to realize from the sale of lots, more than a sufficiency to reimburse the purchase money, and under representations by defendant, that he had a *bona fide* and legal title to the land; that influenced by these representations, they paid part of the purchase money, gave notes for the

residue, and took a deed of general warranty. They state further, that on part of the notes they have been sued and judgment recovered at law. That the title to lot number one, part of the tract containing forty acres, is defective, that its ownership was the main influence to the purchase, as without it, they could not for a moment have entertained the proposition to buy, as this lot cuts them from the bay, and the remainder of the tract is valueless without it, and that defendant was aware of the title at the time of the sale; that defendant is insolvent and unable to respond to damages in case of recovery on the warranty, and they pray for a rescission of the contract, for an injunction and for general relief.

Defendant answering, admits the sale, receipt of the money, notes and existence of the judgment, denies that lot one cuts off the other part of the tract from the bay, but asserts that such other part extends to the bay. Alleges that the title to lot number one, is in his wife, to whom he furnished the money for entering it, and has never been reimbursed, and that the lot actually belongs to him, and his wife should be held as his Trustee as to this land; that he apprised complainants at the time of making the deed, of the state of the title, of the entry being in the name of his wife, but that he paid for it, and in fact, that he handed to one of the complainants, the certificates therefor, and furnished them with all the facts connected with the transaction; that complainants have committed and permitted waste, so that it would be wrong to force him to take back the land; that their possession has not been disturbed, and that they are sufficiently protected by their warranty.

The defectiveness of title to part of the property, and the inability of defendant, through insolvency to compensate the deficiency, are the grounds of equity set forth by complainants, and are sufficient of themselves to entitle them to the injunction. Without committing ourselves to a point only considered for the purpose of this preliminary proceeding, it is sufficient to refer to the authorities cited by complainant's counsel, and more particularly to the doctrine of the courts of Virginia. It is there well settled that "equity will enjoin the collection of the purchase money of land, on the ground of defect of title after the vendee has taken possession, under a conveyance from the vendor, with general warranty, if the title is questioned by a suit, either prosecuted or threatened, or if the purchaser can shew clearly that the title is defective."—Keyton vs. Branford, 5 Leigh, 39, Roger vs. Kane, 5 Leigh, 606, 2 U. S. Eq., Dig., 654.

The equity of the bill has not been seriously questioned, but it has been urged that the answer avoids it, and shews a state of facts which removes the equity set up, and the answer has been treated in the argument as if entitled to the same credit as if the case were submitted for final hearing.

The answer we have seen admits the defects of title and evades the allegation of insolvency.

As to the mode of considering the answer, it is sufficient to refer to the adjudications, which are to this effect:

"On a motion to dissolve, everything is to be presumed against defendant in respect of every matter to which he could answer directly, and has not answered. The court will look to such facts of the answer only as are responsive

to the bill." Moore vs. Jerrill, 1 Kelly, 7; Jones vs. Lamly, 2 Ire. Eq., 278; Dalrymple vs. Sheperd, Ibid., 153; 3 Ired. Equity, 153; 1 Eden Inj. by Waterman. 146.

"On the hearing of such motion, defendant is the actor, and although the contents of his answer are generally to be taken as true, it must fully answer the plaintiff's equity. There must be no evasion, no disposition to pass over the material allegations of the bill, and if a reasonable doubt exists in the minds of the court, whether the equity of the bill is not sufficiently answered, the injunction will not be dissolved." Miller vs. Washburn, 3 Ired. Equity. 170.

"When the equity of the bill is not denied by the answer, but a new equity is thereby introduced to repel or avoid it, the injunction will not be dissolved, but continued to the hearing." Lyvely vs. Wheeler, 3 Ired. Equity, 170.

These are adjudications as to the motion to dissolve; but it is not perceived that substantial difference exists between it, and the case of a motion or application for an injunction after answer.

The order refusing the injunction will be reversed and set aside, and the case remanded to the court below, with directions to grant the injunction as prayed for, and for further proceedings not inconsistent with this opinion.

SULLIVAN AND HYMAN, EXECUTORS, &C., APPELLANTS, VS.

HONACKER, APPELLEE.

1. In a suit by executors or administrators, who have obtained their letters testamentary or of administration in another State, it is error to instruct the jury that the plaintiffs cannot recover without producing the probate of the will or letters of administration duly obtained, &c., and properly authenticated.
2. Whether such letters have been duly obtained or not, is a question to be settled in another stage of the case.
3. Whether they are properly authenticated or not, is a question for the court, not the jury.
4. Every executor or administrator, when he sues *as such*, should make profert of his letters testamentary or of administration.
5. The defendant by craving oyer of the letters and putting in the proper plea, may avail himself of the want of title of such plaintiff to sue.
6. By pleading the general issue *only*, he waives all objections to such letters and admits the plaintiff's right to sue *as such* executor or administrator.
7. The omission of the profert when necessary, is now aided, unless the defendant demurs specially for the defect.

Appeal from Escambia Circuit Court. The opinion of the court contains a full statement of the facts of this case, to which reference is made.

S. A. Leonard, for appellants.

D. Jordan, for appellee.

DOUGLAS, J.

This is an action of assumpsit instituted in the Circuit Court of Escambia county, by the appellants as executors, &c., of John Henly, deceased, against the appellee, to recover the amount of an open account. The declaration is in the usual form, concluding with a profert of the

letters testamentary, under which they claimed to act. The defendant put in a plea of the general issue, and the case was submitted to a jury, "who being duly chosen and sworn after hearing the evidence and argument of counsel, returned a verdict for the defendant, upon which judgment was entered, "that the said plaintiffs take nothing by their suit, &c., from which judgment the plaintiffs have appealed to this court.

The following bill of exceptions appears in the record, viz: "Be it remembered that on the trial of this cause, the court instructed the jury that it appearing upon the trial that the plaintiffs are foreign executors, they cannot maintain this suit as such executors, without producing the probate of the will duly obtained in the State where said will was admitted to probate, and properly authenticated, under the act of Congress of the 26th of May, 1790. To which opinion of the court the plaintiffs by their counsel excepted, &c., and allege it as error here. Our statute, Thomp. Dig., p. 349, sec. 7, Duval Comp., 105, declares that "executors and administrators who shall produce probate of wills or letters of administration, duly obtained in any of the States or Territories of the United States, and properly authenticated under the act of Congress of the 26th of May, 1790, shall be authorized to maintain actions in the several courts of this State, under the same rules and regulations as other plaintiffs."

The question presented for our consideration, is whether the court erred in giving the instruction set forth in the bill of exceptions, to the jury. We think it did. Whether the letters testamentary, under which the plaintiffs profess to act, had been duly obtained or not, was one to be

settled in another stage of the case; whether they were duly authenticated under the act of Congress referred to or not, was a question for the court and not the jury. The plaintiffs, it will be observed, made profert of their letters testamentary. If the defendant entertained any doubt whether they had such letters, or if they had, whether they had been properly obtained or not, his proper course would have been to crave oyer of the letters testamentary. If they had not been produced, that would have put an end to the suit. If they had been produced, and were not properly authenticated according to the act of Congress referred to, the court would have ruled them out, and the plaintiffs must have been nonsuited. If they were properly authenticated, but the defendant had been advised that they had been unduly obtained, or that for any other cause they had no right to institute suit, he could have availed himself of their want of title, by putting in the proper plea. He, however, elected to fill the "general issue" only, by doing which he waived all objections to the letters testamentary, and admitted the right of the plaintiffs to sue *as* executors. 1 Chitty on Pl. Ed., 1840, p. 489, and authorities there cited. Our statute was intended to place foreign executors and administrators, mentioned in it, with respect to the institution and maintainance of suit in our courts, upon the same footing as executors or administrators who had obtained their letters testamentary or of admistration in this State, whenever they should produce such letters duly obtained and properly authenticated.

Every executor or administrator, wherever his letters may have been obtained, should make profert of them.—

Chitty on Pl. vol. 1, Ed., 1840, p. 420, says: "In an action at the suit of an executor or administrator, immediately after the conclusion of his declaration "to the damage, &c." and before the pledges, it was always the course to make a profert of the letters testamentary, or letters of administration." But he adds, the omission of the profert when necessary, is now aided, unless the defendant demurs specially for the defect, citing 4 and 5 Ann, chapter 16, section 1, which is in force here by our statute, adopting the common law of England, and certain British statutes. Thomp. Dig., p. 21, No. 2.

And here it may not be amiss to remark that by the new rules, "in all actions by and against executors or administrators, or persons authorized by statute to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued, shall not in any case be considered as an issue, unless specially pleaded." 1 Fla. R., general rules, No. 22.

Considering that the court below erred in its charge to the jury, above set forth, and that such charge may have materially influenced their verdict, the judgment must be reversed and the cause remanded to that court for further proceedings, not inconsistent with this opinion.

JOHN L. MCKINNON, APPELLANT, VS. WILLIAM W. MCCOLLUM, APPELLEE.

1. It is error to submit an issue upon one plea to the jury, while other pleas remain undisposed of, when it appears that they were not abandoned.
2. The oath of office of Commissioner of Roads and Bridges, need not be administered by a Justice of the Peace, but may be administered by certain other officers.
3. A Clerk of the Circuit Court may appoint a deputy.
4. A Ministerial office may be exercised by deputy.
5. A deputy may, in general, do any act that his principal could do, except to make a deputy.
6. Whether if Road and Bridge Commissioners were not sworn at all, their acts would, for *that cause*, be nul and void. *Quere?*
7. The Supreme Court cannot entertain an appeal or writ of error in a case at law, until after the final judgment.

Appeal from Walton Circuit Court.

This is an action of Trover commenced by the appellant at the Spring Term of said court, A. D. 1854, against W. W. McCollum for the conversion of a horse.

The County Commissioners of Walton county, in 1853, appointed J. W. Williams and James W. Moots, of said county, Bridge and Road Commissioners for road district No. 1, in said county, in which district the said John L. McKinnon resided. The oath of office was administered to J.W. Williams, one of said commissioners, by D. McLeod, Judge of Probate of said county, and the oath of office was administered to the other commissioner, so appointed, James W. Moots, by D. W. McCrannie, deputy clerk of the circuit court of said county. The said Williams and Moots, the year as, 1853 sitting as a board of road commissioners, after summons to the said John L. McKinnon,

entered up two judgments against him for a default in not working the roads in said district, and issued executions thereupon directed to any lawful officer of said county, which came to the hands of the defendant, McCollum, who was sheriff of said county, and which he levied upon the plaintiff's horse, and after legal notice, sold him. The plaintiff forbade the sale and brought this action of trover.

The defendant pleaded not guilty, and two special pleas setting up the matters aforesaid in justification.

J. F. McClellan, for Appellant.

DOUGLAS, J.

This is an action of trover for the recovery of a certain horse, and was brought up by appeal from the Circuit Court for Walton county. The declaration in the court below was in the usual form; to which the defendant put in three pleas: *First,* The general issue, Not Guilty; the *second* and *third* are pleas in confession and avoidance, in which the defendant set up as a defence that he was Sheriff of Walton county; that J. W. Williams, J. W. Moots were Road and Bridge Commissioners of a certain road district in that county; that John L. McKinnon, the appellant, was a delinquent, and that at a court held by the said Williams and Moots, as such commissioners, two judgments were entered up against the said John L. McKinnon, upon which executions were respectively issued and placed in his hands as such Sheriff, and that he levied the said executions upon the horse of the said appellant now sought to be recovered in this suit, and advertised and sold the same by virtue of the said executions as he lawfully might do, &c.

Either the proceedings in the court below were very irregular or the record is very defective. The two pleas of

justification both conclude with a verification, yet they do not appear to have been replied to, or to present any issue for the jury to try. The *first* plea (the general issue) concluded to the county and might, with propriety, have been submitted to the jury, had the other two pleas been disposed of, but thus to submit it while these other pleas remained undisposed of, was an error for which (if there were no other,) the case should be sent back, as it clearly appears that they were not abandoned. There is, however, another more important defect, one which consent cannot cure. There does not by the record appear to have been any final judgment entered in the case, and this court has repeatedly held that a writ of error or appeal will not lie in a case at law until after a *final* judgment, and that if either is taken before, it cannot entertain jurisdiction.—There is a long bill of exceptions accompanying (but not in) the record; this, however, while it speaks of rulings and judgments given during the trial of the cause says nothing of a *final* judgment. This appeal must therefore be dismissed.

And here were we to follow our accustomed course we should stop. But it has been intimated to us, that there are a number of other cases resting upon the same questions as are presented in this, the most important of which perhaps arises out of the objection that Williams and Moots were not Commissioners of Roads and Bridges because they had never taken the oath of office as directed by the statute, and that their acts as such were therefore null and void, and that our opinion is desired in regard to them. We have thought that it might be well for us to look into the question at least, and suggest our views upon

it. This objection is founded upon the phraseology of the statute providing for the appointment of these Commissioners, Thomp. Dig. p. 141, No. 1, which says they "shall take an oath before some Justice of the Peace faithfully to discharge their duties as such," and hence it is inferred that unless they were thus sworn, their acts are for that cause *"Corum non judice."* We are not prepared to admit that result even if they had not been sworn at all; this however is a question which it is not necessary for us now to decide.

It appears by the bill of exceptions that the oath of office was administered to Williams by the Judge of Probate of Walton county, and to Moots by the deputy Clerk of the Circuit Court for that county; this would seem to be sufficient. Judges, and Clerks of the Supreme Court, Circuit Court, and Courts of Chancery, Judges of Probate, Justices of the Peace, and Notaries Public are authorized and empowered to administer oaths, in *all cases,* in which by law oaths are required to be administered. Thomp. Dig. p. 350 Sec. 9, No. 1. The case of these Commissioners was one in which by law oaths are required to be administered; it comes therefore precisely within the scope of the provision last cited which was enacted at the same session as the one providing for the appointment of these Commissioners, and must be construed in *"pari materia"* with it. Clerks of the Circuit Courts are specially empowered to appoint deputies, Thomp. Dig. p. 61, No. 1. The general rule is, that judicial offices must be exercised in person, and that a Judge cannot delegate his authority to another.

What is a judicial, and what is a ministerial function

has been (says Chancellor Kent 3 Comn. 365) a matter of dispute. In Widhurst vs. Waite 2 Inst. 491, Lord Mansfield said, it was taking the definition too large, to say that every act, where the judgment was at all exercised, was a judicial act, and that a judicial act related to a matter in litigation. But a ministerial office may be exercised by deputy; though a deputy cannot make a deputy, according to the maxim, *delegate potestas non potest delegari*, 3 Kent Com. 365, (Ed. 1832 p. 457.) In general ministerial officers can appoint deputies. Com. Dig. Title office, D. 1; so in general a deputy has power to do every act, which his principal might do, but a deputy cannot make a deputy. 1 Bouviers Law Dict. 455.

Let the appeal be dismissed.

Decisions

OF THE

Supreme Court of Florida.

AT

AN ADJOURNED

APRIL TERM, 1855,

Held at Tallahassee.

RICHARD MAIBEN, TRUSTEE, ET AL., APPELLANTS, VS. FRANCIS BOBE, APPELLEE.

1. Where a deed of gift in trust for the separate use of a married woman was made in Alabama, by parties living there at the time of its execution, the laws of that State as to the rights of the parties under it, as administered by her judicial tribunals form the rule of decision of the case. Her Courts having adopted the English rule as to the right of disposition of the *feme* in a case where there was no restriction or discretion in the instrument, their ruling was held applicable and conclusive as to the rights of the parties.

2. In a deed of gift of property to the separate use of the wife, having no words restriction or direction as to alienation, the power of disposition is incident of to the ownership, and she may dispose of it as if she were a *feme sole*.

3. The English and New York rule to this extent, approved and adopted.

4. A married woman will not be protected or sustained in a course of double dealing, calculated to involve an innocent purchaser, and throw upon him the loss to arise from improper action of her husband.

Appeal from a decree of the Circuit Court for Escambia county.

Bobe, the appellee, filed his bill in the Court below, against Rosanna Shomo and Richard Maiben, as her Trustee, and Joseph Shomo husband of said Rosanna, to perpetually enjoin a judgment obtained by said Trustee in Escambia Circuit Court. The judgment sought to be enjoined, was for the value of certain negroes, previously purchased by Bobe from Shomo and his wife, but which were claimed to belong to said Maiben, as Trustee of said Rosanna Shomo. The bills of sale to Bobe, were executed by Rosanna Shomo, whose husband, Joseph Shomo, appended thereto, a relinquishment of all his right and title to the slaves.

The bill alleges that Rosanna Shomo received the purchase money for the slaves, and that the same was their full value. That when the said Shomo and wife, came to Florida, they brought the slaves in question, and in order to deceive and defraud complainant and others, also brought with them a deed of gift of said slaves, from one David Tate to said Rosanna Shomo, which *for the same purpose*, was put on record in Escambia county. That in the year eighteen hundred and thirty-one, on the application of Joseph and Rosanna Shomo, the said Maiben, was appoin-

ted by the Circuit Court of Baldwin county, Alabama, trustee of said Rosanna Shomo to protect and enforce the trust supposed to be created by the deed of gift from David Tate to said Rosanna; that complainant had no knowledge of the said record, or of the appointment of said trustee, until at the trial of the suit at law against him, and therefore insists that he, complainant, is a *bona fide* purchaser, without notice or knowledge of the said trust, so as aforesaid created.

The complainant annexed as an exhibit to his bill an authenticated copy of the deed from David Tate to Rosanna Shomo, which is as follows:

BALDWIN COUNTY,

State of Alabama.

For and in consideration of the love and affection I bear to my sister, Rosanna Shomo, and in accordance with my previously expressed intention, I do hereby give and bestow on my said sister, Rosanna Shomo, and to the heirs of her body, the following property, to wit: (naming them,) not to be subject to the control, or debts, or contracts of her husband Joseph Shomo, and in case of a further marriage, or marriages of my said sister, Rosanna Shomo, the above named property is not to be subject to the control, debts or contracts of any future husband or husbands, but it is my intention that the negroes above named, be solely invested as the property of my said sister, Rosanna Shomo, and the heirs of her body. Signed, sealed and delivered this fifteenth day of November, A. D., eighteen hundred and twenty-nine. DAVID TATE.

In presence of

P. R. TURNSTALL,
WM. C. VAUGN.

This deed or bill of sale, was recorded in Alabama, and also in Escambia county, Florida, and is the deed under which Maiben, who as appears by the record, was appointed by the Circuit Court of Baldwin county, Alabama, trustee of Mrs. Shomo, claims title.

Mrs. Rosanna Shomo answers separately and claims, that the negro slaves in controversy, were conveyed for her separate use. She alleges that the deed of trust was recorded in the proper office, shortly after her arrival in Florida, and that at the same time, the transcript of the appointment of trustee was handed the clerk to be also recorded, but he refused to record the same, because it was not the original, but a mere copy.

She further says, that she never made any contract of sale of the slaves in question, with complainant, and never had any negotiations for that purpose. She admits that she signed the bills of sale for the slaves to complainant, but declares that she did so under the coercion and threats of her husband, who stated to her that unless she signed the bills of sale, he would run all her negroes to New Orleans and sell them; that she never received one cent of the purchase money from complainant or any one else. She avers that a fraud was perpetrated upon her rights in regard to said slaves, and that complainant knew that her husband, Joseph Shomo, with whom the contract was made, had no right to these slaves. That when she signed the bills of sale, no question was asked as to her willingness to do so, and but through fear of her husband, she would have declared her unwillingness when complainant and his agent, Micajah Crupper, came to her house.

Joseph Shomo answers and states, that he made the

contract with complainant, Bobe, for the sale of the slaves, without the concurrence or consent of his wife, and that he apprised complainant at the time, he had no title to said slaves and told him they were the separate property of his wife, in consequence of which complainant bought them at about half their value. That the purchase money was paid to him, Joseph Shomo, and not to his wife, and was applied to his own priviate purposes, his wife not receiving or enjoying any portion of it. He admits that his wife signed the bills of sale reluctantly, but asserts that no fraud was practiced or intended on complainant, who was advised of the nature of the title, and who in consideration of getting the slaves at half price, was willing to run the hazard of a recovery of them by the said Rosanna Shomo.

Maiben, the trustee, in his answer, admits his appointment as trustee, &c., and declares that the suit at law for the slaves, was brought at the request of Mrs. Rosanna Shomo, and in discharge of his duty as trustee.

Micajah Crupper, a witness for complainant. testified that shortly after Joseph Shomo came to Pensacola with his family and negroes, he enquired of witness if he knew of any person who would be likely to purchase some of his slaves, and witness referred him to complainant. About the same time, he presented the conveyance made by David Tate to Rosanna Shomo to be recorded. supposing witness to be clerk. Witness handed the paper shortly after to the clerk, and he recorded it. Complainant asked me if I thought the title was good. He came to the office and examined the conveyance from Tate to Mrs. Shomo, and I gave it as my opinion that the title was in Mrs. Sho-

mo, and was good. I advised complainant to purchase.—A few days afterwards complainant came to me and requested me to draw up a bill of sale, which I did, and at his request, I went to Mrs. Shomo's in his company to get her to sign the bill of sale. She signed it and received the money. Afterwards at the instance of complainant, I drew another bill of sale for other slaves. On our arrival at Mrs. Shomo's, I presented the bill of sale to her for signature, and asked her if she knew what it was. She answered that she did, and that it was unnecessary for me to read it. She signed it and received the money in the presence of her husband and son, without objection.

This witness further says, that he was deputy clerk of Escambia Circuit Court. There was no paper presented for record, except the deed from David Tate to Mrs. Shomo. He saw nothing in the deportment of Mrs. Shomo to induce the belief that she was coerced to sign the bills of sale.

F. E. de LaRua, another witness for complainant, testified that he was clerk of the Circuit Court when the deed from Tate to Mrs. Shomo was recorded, and that no other paper was presented for record. The deed from Tate was handed to my deputy, Mr. Crupper, by Mr. Shomo.

David Shomo, a witness for defendant, testified that he was present when complainant paid for two negroes, purchased from J. Shomo. The money was counted by Mr. Crupper and myself, and was paid to Joseph Shomo. Mrs. Shomo was called out of her private room to sign the bill of sale, and after signing, retired to her room, leaving the paper and the money on the table. No question was asked as to her willingness to sign the bill of sale. She sign-

ed it reluctantly and under the threats of her husband, that if she did not sign it, he would sell the whole of them. In answer to the cross interrogatories, this witness declares that he is a son of Joseph and Rosanna Shomo, and was at the time of the transaction spoken of, between twenty-four and twenty-five years of age; that he knew of Richard Maiben being trustee of his mother, and knew of no fraud intended to be practised on complainant. His mother, Mrs. Shomo, was opposed to selling any of the negroes. The threats spoken of, were not made in the presence of complainant, nor in his hearing. He has heard of the sale of others of the same lot of negroes, but does not know to whom, when or by whom made.

Joseph Shomo was examined as a witness for defendant, who declared that before the sales to complainant, and early in March, 1847, he presented the deed from Tate to Rosanna Shomo, and the record of the appointment of Maiben as trustee, to Micajah Crupper, as deputy clerk, to be recorded. When Mr. La Rua, the clerk handed me the deed from Tate, he told me he could not record the transcript of the record referred to, because it was not the original, but a copy, and he was not authorized to record a copy. He also states that Micajah Crupper, to whom he had communicated the fact, knew of the appointment of Maiben as trustee. He witness, made the sale to complainant and received the money, and not Mrs. Shomo.

The court below perpetuated the injunction against the judgment obtained by Maiben the trustee, from which an appeal was taken to this court.

D. Jordan, for appellants.

B. D. Wright, for appellee.

BALTZELL, C. J., delivered the opinion of the court.

On the 15th of November, 1829, David Tate gave by deed properly executed, to his sister, Rosanna Shomo, several negroes with the provision that they were "not to be subject to the control, or debts, or contracts of her husband," and to be solely invested as the property of his sister." Tate, his sister, and her husband, at this time and for a considerable period afterwards, resided in the State of Alabama. The two latter, husband and wife, removed to Pensacola, in this State, where a sale was made by them to Bobe, on the 15th day of June, 1847, of negro Henry, for the sum of three hundred dollars, and afterwards on the 1st of January, 1848, of negro woman Jents and her child Flemming, for the consideration of six hundred dollars. Bills of sale were executed in the name of Mrs. Shomo and her husband united in ratifying and confirming the sale so far as his interest was concerned. Before removal from Alabama, application was made to the Circuit Court of Baldwin County, for the appointment of trustees, and two, William Waller and Richard Maiben, were appointed to take charge of the trust estate for Mrs. Shomo.—Maiben as surviving trustee, instituted suit and recovered judgment in the Circuit Court at Pensacola, against Bobe the purchaser of these slaves, for the sum of sixteen hundred dollars, to be relieved from which, Bobe filed his bill in chancery, and this gave rise to the present controversy.

The bill is inartificially drawn, leaving a good deal to inference, and deficient in many material allegations.—

The case, however, has been discussed on the merits, and we now proceed to consider it in that light, without regard to the objections that might otherwise be entitled to consideration.

There has been no question made as to the effect of the deed of gift nor has it been denied that a separate estate is created by it. The main question then arises as to the power of the *feme,* Mrs. Shomo, to dispose of the property.

Whatever difference of opinion there may be on the subject elsewhere, in Alabama where this deed was made and where all the parties resided at the time of its execution, there is no diversity. The language of the court there is emphatic. "We think the authorities are clear that a woman having a separate estate may charge or sell or dispose of it at pleasure and without the consent or concurrence of her trustee and may make a will of it, if personal property at her death, and that a court of law to some extent, and a Court of Equity to the fullest extent will give validity to her acts. And where a deed, will or other instrument creating such separate estate imposes no restrictions or conditions on the power of alienation or absolute disposition, the law will impose none except such as it imposes on the *feme sole.* In the case of Bradford vs. Greenway 17 Ala. 197, this court showed a leaning to the English doctrine. The question being now submitted for decision we shall hold the English and New York doctrine which gives to the wife, having a separate estate, the *jus disponendi,* unless the same is taken away or restricted by the deed creating the estate." Hoopers Ex. vs Smith 23 Ala. 643.

There is in this deed of gift of Tate to Mrs. Shomo no restriction as to alienation, no direction of any kind as to the disposition of the property. This court having held in the case of a contract made in a sister State, that the laws of that State as administered by her judicial tribunals must form the rule of its decision, this decision of the Supreme Court of Alabama, might well be regarded as conclusive as to this point. Watts vs. Clardy, 2 Fla. 369.

But we have been strongly urged to assert the South Carolina doctrine, as the governing one, to the effect "that a married woman cannot part with her separate estate or change it in any way without an examination, and that the power of appointing such estate must be expressly given, and the mode prescribed, be strictly persued." Ewing vs. Smith, 3 Dess. It is not perceived how the decrees of the courts of South Carolina can be held to apply to a case in which there is no proof that the parties ever lived there, or had in view their laws in making the contract.

Without enquiring at present into the reason of the rule let us examine into the adoption of it. It was first started in the case of Ewing vs. Smith in 1811, 3, Dess. 417, by a divided court, three to two, and amongst the dissentient Judges we find that distinguished jurist, Chancellor Dessaussure, and so the matter stood until 1826, when the court of appeals consisting of three law Judges and two Chancellors Dessaussure and Waddy Thompson, all agreeing held the following language. "How far a married woman may be considered as having the disposition of property settled on her for her separate use, is a question which *is not yet finally settled* in this State. The subject is so fully

considered in the able opinions in the case of Ewing vs. Smith 3. Dess. 417, that we shall not have occasion to resort to any other authority. It appears from the cases there collected to be the well settled doctrine in England that a *feme covert* has the exclusive right to dispose of such property as is settled to her separate use. From the time of Norton vs. Turvill 2 P. Wms., which was decided in 1723 up to the case of Ellis vs. Atkinson, 3 Bro. C. C. 565, decided by Ld. Thurlow in 1792, being a period of near seventy years, the whole current of doctrine is that way. There was a short period of about ten years from the resignation of Ld. Thurlow, until Lord Eldon came into office, during which time Lord Rosslyn and Lord Alvanly seemed disposed to question the correctness of these decisions. But Lord Eldon has since recognized their authority and there is now no principle better established in the English Courts." Sh. Frazier vs. Center &c. 1 McCord Cly 274.

In this condition the subject remained until 1846, when the case of Reed vs. Lamar announced the contrary doctrine supported by other more recent cases. For the fifteen years preceeding the case of Frazier, and twenty years succeeding the case of Ewing, decided by a devided court, making a period of thirty-five years, the question may be considered as unsettled in South Carolina, her chancellors and judges being greatly divided about it. Let us turn to the other American courts; here we find Pennsylvania favoring this doctrine. Tennessee apparently adopting it in Morgan vs. Elam, though the case did not call for a decision on the point, 4 Yerger, 375, and the judges did not unite in this view of it, afterwards asserting the very contrary in Powell vs. Powell. "In the absence of any restriction or

limitation of appointment, the rule in equity, on the subject is that a *feme covert,* acting with respect to her separate property, is competent to act in all respects as if she were a *feme sole,* 2 Vesy, Sr., 190, H...vs. S...., 1 B. C.C., 192 Clancey on Hus. and wife, 282, and this rule has been applied to all her dealings on the subject of that property;" 9 Hump., 480. Reliance is placed on Mississippi as favoring that view, yet we shall find her courts asserting it on the faith of the Tennessee case of Morgan vs. Elam, and strange to say, a few months only, after that case had been, in effect, overruled, and after the Supreme Court of Mississippi had announced an adverse opinion in Frost, &c., vs. Doyle, through C. J. Sharky, that "the general rule at common law is that a *feme covert* having a separate estate, acts with regards to it as a *feme sole,*" 7 Smeed and Marshall, 75.

From these conflicting, varying and discordant views, we turn to the American courts asserting the right of the woman to dispose of her property where there is no restriction in the instrument; and, first, we have the case of Jacques vs. the Methodist Church, 17 Johnson, 548, decided by the New York Supreme Court, then in its prime, and commanding the confidence of the whole nation—a case elaborately argued, and of the decision of which the Supreme Court of Connecticut say, "we adopt the English rule, not only supported by the highest authority, but because we think it also supported by the strongest reasons. These are most clearly and forcibly stated by the distinguished judges in Jacques vs. Methodist Church. We think they are unanswerable, and deem it necessary only, to refer to the views expressed in those opinions as expres-

sive of our own." Jenley vs. Huntington, 20 Connecticut 175.

The later New York courts hold language fully as decided; "no doctrine is more fully and clearly established than that a *feme covert,* in regard to her separate estate, is considered in equity in all respects as a *feme sole.* The rule was first laid down by Lord Hardwick, in Peacock vs. Monk, 2 Vesey Sen., 190, and for a long time courts of equity seem to have hesitated as to its adoption, and were disposed to qualify and restrict its application. No traces however, of such hesitation or doubt are to be found in the more recent decisions, but on the contrary, they have carried out the rule in the fullest sense that its terms import; consequently it is now certain that when real or personal property is settled to the separate use of a married woman, her power of disposition or control is subject to no other limitations or restraint than such as the terms and the settlement plainly impose." Noyes vs. Blackman, 3 Sanf. 540, 17 John. 548; 1 Vesey Jr. 46. 7 Paige 9, 3 Bro. C. C. 8. 20 Wend. 570; 14 Vesey, 542. 7 Paige 112 3 M. & K. 220, 1 Sanf. 17, 287. 1 Cr. & Ph. 53. 1 Beav. 1.

In Virginia, Maryland, Ohio, Missouri, Vermont and the later decisions in Kentucky, we find the same views. West vs. West 3 Rand. 373. 2 Leigh 183, 5 B. M. 163, 10 14 Ib. 320; Missouri 760. 4 Vert. 336. 10 Ohio 216.— North Carolina is equally emphatic. "In this respect, real and personal property differ, for as to the latter the separate estate of the wife includes her *jus disponendi,* as held in Fettiplace vs. Gorges 1 Vesy Jr. 46 and 3 Bro. C. C. 8, in

which Lord Thurlow explicitly states the distinction between the two kinds of property; by saying that where the wife makes a voluntary disposition of an estate held to her separate use against the heir, it cannot be carried into execution, but with respect *to personal property, her gift is good.*" Ruffin C. J. Newbin vs. Freeman, 4 Iredell's Eq. 318. Georgia too is quoted in Hill on trustees 513 as favoring the doctrine. 12, Geo. 200.

In Alabama we have seen the adoption of the same view. 23 Ala. 643.

In New Jersey, after a very elaborate argument against the English doctrine, the chancellor said, "in the midst of such conflict of opinions it is clear that we are left, in the determination of the question upon what may appear to be sound principles of equity. And I think it may be safely said that a *feme covert* is a *feme sole* as to her separate estate, so far as to dispose of it in any way not inconsistent with the terms of the instrument under which she holds. Any danger apprehended from such rule can be avoided by words restraining the disposition and directing the precise mode in which it may be made. 3 Green 551.

It is erroneously assumed, we think, that Chancellor Kent contended for the strict doctrine when discussing the Jacques and Methodist Church case. His main aim evidently in that case was against requiring strict terms forbidding or directing alienation. "But if the intention be equally clear and certain in the instrument in question, why should more explicit language be required?" At the close of his opinion in summing up the result of his examination of the cases he says, as to this, "Perhaps we

may say that if the instrument be silent as to the mode of exercising the power of appointment or disposition, it intended to leave it at large to the discretion and necessities of the wife, and this is the most that can be inferred." 3 Johns Ch. 114.

How very different is the language of that eminent Jurist Judge Story whose work on Equity Jurisprudence has become a text book to the American lawyer. "There is *no doubt* that a gift of personal estate, or of the rent and profits of real estate to a married woman for her separate use during her life would give her a complete power to dispose of the same." 2 Story Eq. 828 30 § 1393.

Again "it may now be laid down as a general rule that all anti-nuptial agreements, for securing to a wife separate property, will, unless the contrary is stipulated or implied, give her in equity the full power of disposing of the same, whether real or personal, by any suitable act or instrument in her life time, or by last will in the same manner and to the same extent, as if she were a *feme sole.*" 3 Story, Eq. 827 § 1391.

"When a married woman has a power to dispose of property, she may execute it in any manner capable of transferring it. When she has a power only over it she must dispose it in the manner prescribed by the power." 2 Story, Eg. 828 § 1391.

The English text books use language no less decided. "It is settled that an express negative declaration is requisite to deprive a *feme covert* of her *prima facie* right of disposing of her separate estate. Hill on trust, by Wh. 422 ; 2 Rop. Hus. and Wife 236, 240; Brown vs. Bamfro, 11 Sim. 131; 2 Chitty Black. 293; n. 12.

Nor do we apprehend there is the difficulty about the English cases which is assumed to exist as to the point under consideration. When the case of Wagstaff vs. Smith was argued, not long after the decision of the disputed cases of Pyles vs. Smith, Whistler vs. Newman, Hulme vs. Tenant, Peacock vs. Monk, &c., the Master of the Rolls expressed himself as follows. "The only question appears to me to be whether this lady has an absolute complete life interest in the dividends to her separate use. If she has, then unless the former doctrine of this court, that as to separate property a married woman is to be considered a *feme sole,* is abrogated by later determinations, she had a right to make any disposition she thought fit of that separate property. There is no case in which that doctrine has been impeached, that is, the broad rule that a married woman is to be considered a *feme sole* as to property to her separate use. There are many cases in which the question has been whether the absolute property, including a power of disposition, was intended to be given, or whether it was a personal gift only, without a power of disposition," &c., &c. This is very different, here are no words of control, no words of restriction. Here are the very words to give the absolute property. "The settlement was to trustees to permit the *feme* to take and receive the dividends of £750, to her own use during life, independent of her husband, &c., and she assigned to a third party." 9 Vesey 520.

"Executed trusts" says Ch. Kent, "are enjoyed in the same condition and entitled to the same benefits of ownership, and are consequently disposable and devisable, exactly as if they were legal estates and there rights the

cestui que trust possesses without the intervention of the trustee." 4 Kent. 302.

A trust is executed either when the legal estate passes as in a conveyance to B. in trust, or for the use of C. or when only the equitable title passes, as in case of a conveyance to B. to the use of C. in trust for D. The trust in this last case is executed in D. though he has not the legal estate. 4 Kent. 305.

Such is the relative position of this subject in the English and American courts, and as treated by judges, jurists and writers of the two countries.

Were we free to adopt the strict rule with such slight authority in its favor, we are yet constrained to say that it has not our sanction on the score of principle or analogy of propriety or fitness. It restricts the alienation of property. Such restrictions have been condemned from the very earliest ages of the law; they were held by Lord Coke to be absurd and repugnant to the freedom and liberty of freemen. Chancellor Kent says that "the maxim which he Lord Coke cites, contains a just and enlightened principle worthy of the spirit of the English law, in the best ages of English freedom. *Iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem.* 4 Kent 131.

Perpetuity the condition of an estate being rendered perpetual or for any period of time inalienable by the act of proprietors. Holthouse Law Dict., 335.

"A perpetuity is a thing odius in law, and destructive to the commonwealth. It would put a stop to commerce and prevent the circulation of the property of the kingdom." Vernon, 164. "A perpetuity is defined to be where though all who have an interest should join in a convey-

ance, yet they could not bar or pass the estate. 5 Jacob Law Dic., 142.

"Experience says Sir Wm. Blackstone, hath shown that property best answers the purposes of civil life, especially in commercial countries, when its transfer and circulation are totally free and unrestrained." An elegant writer speaks on the subject as follows: "The necessity of imposing some restraint on the power of protracting the acquisition of the absolute interest or dominion over property, will be obvious, if we consider for a moment what would be the state of a community in which a considerable proportion of the land and capital was blocked up. That free and active circulation of property, which is one of the springs as well as the consequences, of property, would be obstructed, the improvement of land checked, its acquisition rendered difficult, the capital of the country gradually withdrawn from trade, and the incentives to exertion in every branch of industry diminished. Indeed such a state of things would be utterly inconsistent with national prosperity, and these restrictions which were intended by the donors to guard the objects of their bounty against the effects of their own improvidence, or originated in more exceptionable motives would be baneful to all." 1 Jarman on Wills, 219-20.

The most of the State constitutions seem to have reference to this subject, by declaring "that perpetuties and monopolies are contrary to the genius of a free State, and ought not to be allowed." Florida Constitution, Article second, Section twenty-fourth. Indeed one of the fruits of our glorious revolution was connected in some degree in the public regard with this question, of unfettering of es-

tates. Our Legislature seems to have provided against this danger, by declaring in the law to secure the rights of married women, "that husband and wife shall join in all sales, transfers, and conveyances of the property of the wife, and the real estate shall only be conveyed by deed attested." Thom. Dig., 221.

According to the strict doctrine, neither the trustee, the married woman, nor her husband, nor altogether, can alien or dispose of the property, thereby creating a perpetuity within the strict definition of the term; nor can it be sold, except by the permission of a Court of Chancery. As a fair consequence, Courts of Equity may be considered as the owners as far as alienation is concerned, to protect against bad bargains, in case of necessity to make good ones for them. Now admitting this to be a rightful exercise of judicial power, which is by no means conceded, the enquiry arises, why not go further and protect them as to a disposition of the income, and the disbursement of the receipts and profits of the separate estate, far more important than its mere possession or ownership.

But again, this restriction upon the rights of married women implies a distrust not by any means flattering to them or to the other sex. Are those of our state less to be trusted or confided in, in this respect than the women of England or New York, and other states of the Union where freedom of alienation prevails; are they more imbecile? have they less character, less self reliance and ability to assert their rights, or have those of the other sex greater disposition to impose upon, oppress and take advantage of their weakness and infirmities? We think not. If they are unfit to be trusted with powers of alienation, their

right of ownership may well be doubted. Their sound judgment, good sense, and intelligence, their virtue and native energy, with the gallantry and sense of justice of the other sex are their surest and safest reliance. The world has an experience in its past history, not to be forgotten, of the effects of special guardianships of this kind. This experience has demonstrated that to hedge their property with restrictions and guards is as important and useless as to surround their persons by stone walls to prevent injury and insult. We have then the experience of the English courts for upwards of a century, and of the first and best minds of that country, jurists, judges and commentators, in favor of giving this right to married women and against the restriction. In a late work of merit we have this tribute to the law as thus administered, "On surveying the temple of English jurisprudence we behold in it a range of columns which while they impart symmetry and beauty to the whole building, afford it also material support. "The laws of property are nicely adapted for preserving harmony between the diversified elements which constitute the sources of national prosperity, at a point where they are most liable to clash, by securing the necessary freedom of commerce in the alienation and pledge of every species of property on the one hand, and the proper and reasonable regard to private and family purposes, in the settlement of property on the other." Lewis on perpetuity 4.

We have in addition to this the vast preponderance of the American courts, jurists, judges, and writers in its favor, we have the provisions of our own law, fortified by our own views of the fitness and propriety of the thing. Can we

then hesitate as to its adoption? In doing this we are by no means to be considered as adopting the rule to the full extent to which it has been carried by the English courts. We have purposely avoided the discussion of other questions, having an apparent connection with the one under consideration, desiring to confine our decision to the simple point presented as to right of alienation, where there is no restriction or direction in the instrument creating the separate estate. One other remark in connection with the case; it will be seen that as alienation is not permitted by the trustee according to the Carolina rule, a suit at law to recover damages as a substitute for the property, affirming as a consequence, its sale at the option of the trustee is also inadmissible. But aside from this, what disposition, is to be made of the money when obtained by the judgement? Is this to paid to the *feme?* If paid to her, has she power over it and to what extent? If paid to the trustee, how is he to dispose of it?

Mrs. Shomo charges that the sale was made through the improper influence and coercion of her husband; undoubtedly, if this is the case, the court without hesitancy would refuse the plaintiff the relief asked, and the court would scrutinize, very carefully and cautiously, the act to ascertain that it is not liable to that objection.

She charges that "her husband informed her unless she signed the bills of sale he would run all the negroes to New Orleans and sell them, for he had the advantage of her and would use it and do just as he pleased. She was well convinced he would do so and she would never know where they were. As she was thus compelled to sign the bills of sale or have all her negroes run off, she thought if she

signed in Pensacola she could afterwards recover them by law in our courts." She states further that "a short time previous to the sale of these negroes her husband took a valuable female slave of hers in open defiance of her, and placed her on board of a vessel to be shipped to New Orleans for sale when a friend of her, Mrs. Welborne interposed in her behalf and prevailed on her husband to bring her back."

The testimony shows that other negroes of hers were mortgaged to Moreno and sold to Caldwell and Jemison.

She complains that a fraud was perpetrated upon her rights by her husband and said Bobe; knowing that her husband had no right to these slaves, he Bobe unjustly forbore to ask her if she was willing to sell them, had he done so she would have told him that she was not willing to sell them, and but for her husband's threats she would have declared her unwillingness when Complt. and his agent came to her house." Her account of her signing the bills is as follows: "He informed her that on a certain day Bobe would come to the house with others, to have the bill signed. When he came with the bill of sale of Jints, one Mr. Crupper came along. This respondent was called out of her private room by her husband into the presence of these gentlemen, Crupper drew out of his hat or pocket a paper and asked if she would read it, she knowing what they had come for said he need not, it was then handed to her and she signed it. No questions were asked her if she was willing to sign. The money was paid to or received by her husband, and she withdrew."

It no where appears by the testimony of either Shomo or his son, nor by any allegation of Mrs. Shomo that Bobe

had any information or knowledge of his unwillingness or coercion, so that there is no reason nor cause for the allegation of fraud as to him, on the contrary he appears to us as a purchaser for a valuable consideration without notice as to this objection.

There is neither justification nor excuse in our opinion for the conduct of Mrs. Shomo in this matter. That she feared wrong or injury from her husband is no reason why a stranger should be wronged. The apprehension of loss of property by her does not justify her in transferring the loss to him, nor does there seem to have been a necessity for such action, as by her own statement, a friend interfered on a prior occasion; why not resort to this expedient when a necessity existed for it at another time. But she seems to have relied upon the courts in support of her rights; why not appeal to them in the first instance in time to arrest the danger? Why wait until an innocent party had bought and paid his money for the property, to commence upon him and try the experiment of getting a double price for herself and family. If this and other purchases are to be disturbed, a handsome speculation will be made by her silence, and the confidence reposed in her and her family, to enure to their joint benefit. There is another fact to be borne in mind altogether inconsistent with fair dealing, and with this idea of coercion. One of these negroes was sold in June, 1847, the other in January, 1848, and during this time Mrs. Shomo admits she traded at the store of Bobe; now why not inform him of the fact of this constraint and coercion, and admonish him not to buy again? Married women are entitled to the peculiar regard of Courts of Equity, but it is when they present a case

of fairness and of equity, free from unfair dealing and impropriety. We are rather inclined to the opinion that the defence of this party, Bobe, might have availed him at law. Such we understand to be the decision in 3 Hill 249, Ford vs. Caldwell. We have not this case before us and do not decide the point, nor is it necessary as already intimated the case has been presented on the merits without objection on such grounds.

The decree of the court below will be affirmed with costs.

DuPONT, J., delivering the following

DISSENTING OPINION.

I am constrained to dissent as well from the view which the majority of the court have taken of the law and the facts of this case, as from the judgment which has been rendered therein. The main point which has been so elaborately discussed in the opinion delivered by the Chief Justice, is not a new one. It engaged the attention of the English Court of Chancery at an early day; and there is no subject, perhaps, in the entire range of English jurisprudence which has been productive of more perplexing anxiety or painful solicitude. The very frequency of its occurrence in the English Courts, conclusively demonstrates the fact, that the judicial mind of that country has failed thus far, to find a satisfactory foundation upon which to rest, and I have the authority of Chancellor Kent for saying, "that the English decisions, (on this subject,) are so floating and contradictory, as to leave us the liberty of adopting the true principle of these sentiments." In this estimate of the English decisions, Chancellor Harper also concurs. In the case of Reid vs. Lamar, (1 Strob. Eq. R.,

39,) he took occasion to remark as follows: "I need not do that which has been done before by abler men, compare and collate the cases, (though I have examined many of them,) with a view to show that they are uncertain and contradictory between themselves, many of them referable to no fixed principle, and a source of embarrassment and regret to the ablest Judges who have administered the English Chancery law."

In the face of the scrutinizing examination which these two lights of American Ch. Ju., have given to the decisions of the English Courts, it would seem to be a work of supererogation, if not vanity, to attempt to tread the devious windings of that massy labyrinth, whence they have so recently emerged, with any expectation or even hope, of being able to make any further contribution to the cause of legal science. We may well be satisfied with the fidelity of their efforts, and content ourselves with the fruit of their researches.

Notwithstanding, however, the fluctuation of the English cases with respect to this subject, it must be admitted that the *current* of the decisions tends pretty conclusively to the establishment of the position, "that a *feme covert* acting with respect to her separate property, is competent to act in all respects, as if she were a *feme sole.*" This is the doctrine announced in the case of Peacock vs. Monk, (2 Vesey, 190,) and again approved and acted upon by Lord Thurlow in the case of Hulme vs. Tenant, (1 Bro. C. C., 16.)

This doctrine, as thus broadly laid down, has been a fruitful source of embarrassment to the English Chancellors, so much so indeed, as to have caused Lord Thurlow upon one occasion to declare, that in enforcing the doctrine, he acted

upon the authority of the prior cases, and directly against his own inclination and judgment. He further remarked "that if the point were open, he should have thought that a *feme covert,* who had a separate estate, should not part with it, without a judicial examination," and Lord Eldon himself, did not hesitate to expose the injustice and unreasonableness of the doctrine, and is made to declare in Sperling vs. Rockfort, (1 Vesey, 164,) that although he could not reconcile all that was said by Lord Roslyn, in Whistler vs. Newman, to former cases, yet he wished that the law might turn out for the protection of married women, to the extent to which it is there represented. Lord Alvanly, (as master of the Rolls,) in the case of Sackett and Wife vs. Wray, (4 Bro. C. C., 483,) held that in reference to the separate property, the wife had no disposing power, but what was given her by the deed of settlement, and he meant to question the decision in Newman vs. Cartony, and Hulme vs. Tenant, Ellis vs. Atkinson, and Pybus vs. Smith.

Lord Roslyn was also strongly opposed to the doctrine, and upon several occasions manifested his entire dissent from the extreme length to which it had been carried in some of the decided cases. In the case of Whistler vs. Newman, (4 Vesey, 129,) he exposed its utter nakedness by remarking, that the doctrine in Hulme vs. Tenant, took away all protection from married women, and made trusts for their benefit of very little importance. That if this rule in that case, and in Pybus vs. Smith, and Ellis vs. Atkinson, was to be pushed to its full extent, a married woman having trustees and her property under the administration of Chancery, was infinitely worse off and more unpro-

tected than she would be if left to her legal rights, which the husband cannot *proprio mariti* affect. And even in the case of Hulmes vs. Tenant, which is a leading case for the support of the doctrine, Lord Bathurst at first dismissed the bill, but it was afterwards sustained by Lord Thurlow upon a rehearing.

In the midst of this fluctuation of decisions, discrepancy of opinions, and expressions of regret, it certainly could not have been deemed either rash or presumptuous in us, had we elected to discard in a measure, the authority of English *precedent,* and invoked the surer guide of sound reason, common sense and common justice. And this election we might the more readily have made, in consideration of the fact, that this case presents for the first time in the judiciary history of our State, a suitable opportunity to adjudicate authoritatively, the point now under consideration, and we were consequently, in a measure relieved from the pressure of *"stare decisis,"* at least to the extent of our own adjudications.

Again, we ought to have been admonished by the painful embarrassments which are constantly experienced by the English Chancery, in the application of the doctrine as it seems to have obtained there, of the importance, in setting out upon our judicial career as a State, of placing the law upon the immutable basis of *correct principle.*

But had we no other apology for this seeming disregard of *precedent,* the delicate relation which as men we bear to the very interesting class of society, who are more particularly interested in the question, ought to afford a sufficient motive. It would be monstrous indeed, that when upon every other subject that affects the interests of men,

the law is continually changing to meet the progress of advancing civilization, upon this the most interesting of all subjects, and in reference too to a class of society who have kept even pace with the utmost progress of the age, it should be decreed to be as fixed and unalterable as is "the law of the Medes and Persians." Without intending to question the gallantry of the old English Chancellors, I may venture to assert that the sentiment that "it was against common right that the wife should have a separate property from her husband, *and therefore all reasonable intendments were to be admitted against her,*" would scarcely find a response at the present day; and yet such is the reported language of Lord Macclesfield, in 2 P. W. 82, and Lord Talbot seems to have been equally exacting with reference to the ladies of his day, for in one of the cases decided by him, (9 P. W. 355,) he is made to declare "that though the husband settles an annuity in trust for his wife's separate use, yet if he provide her with *clothes and other necessaries* it will for the time be a bar to any demand for arrears." Chancellor Kent, with his probing scrutiny, seems to have penetrated the true secret of this doctrine as it obtained in the English Courts, and intimates quite strongly that it might have originated and found its sanction *in the spirit of the age.* He remarks, (3 John. Ch. R. 29,) "Such strong aversion to the wife's independent enjoyment of her separate estate, manifested so early in the history of the cases, may have given a permanent tone and color to the doctrine of the court; and perhaps the language of these cases will not now be thought to be founded in equity and justice."

The fundamental error of the reasoning upon which the English doctrine is based, consists in the assumption that

the settlement to the use of the *feme covert,* carries with it all the incidents of absolute ownership, of which the *jus disponendi* is the most prominent. Vide Fettiplace vs. Gorges—1 Vesy, Jr., 46. This assumption with respect to ownership, is clearly without any good foundation, when sought to be applied to the rights, powers and capacities of married women; for being purely a doctrine of the common law, it can by no principle of sound logic be made to bear upon a class, who by the canons of that very system are placed under disabilities as to ownership. Again, where there are trustees appointed to protect the trusts, it is very clear that the *legal* title to the property resides in the trustee, and in no one else; how then can the *cestui que trust* assume to convey that legal title, when she has only an equitable interest. And yet to sustain the *principle* of the English cases, it would seem that she must have the capacity to convey the legal title, for this is one of the "incidents of ownership." Now, in the case supposed, viz: where there is the intervention of a trustee, can she convey the legal title—can she convey that which she does not possess? And yet without the conveyance of the legal title, there is no full exercise of the *jus disponendi,* and consequently the reasoning must fail upon every principle of sound logic. But to demonstrate more conclusively the fallacy of this doctrine when tested by a practical illustration, let us suppose the *feme covert* (being by the terms of the deed of settlement a *cestui que trust*) exercises to the full extent her *jus disponendi,* what interest has the purchaser obtained? Evidently only such as resided in her at the time of the sale, viz: an equitable interest, and the legal title remains undisturbed. But a *complete* title must

embrace both the legal and equitable interest: and yet such a defective disposition as this, is assumed to be the practical enjoyment of one of the principle *incidents* of property. If any further argument were necessary to establish the fallacy and utter unsoundness of the position, I think it may be found in the painful embarrassments that have constantly met the English Chancery Courts at every step that they have taken to give it a practical application. It may be truly said that the practical application of this doctrine has been made amidst the wailings and lamentations of the English Chancellors, from the time of Lord Thurlow to the present day.

The foregoing reasoning is equally applicable to the case where there is, by the terms of the deed, no intervention of a trustee, but the property is made to vest wholly and directly in the *feme covert* for her separate use. For even those courts which have most strenuously sustained the English doctrine, all (with a solitary exception so far as I am advised) admit that the appointment of a trustee is not indispensable to sustain the trusts for the separate use of the wife, but that where the appointment has been omitted in the deed of settlement, the husband will be converted into a trustee, *pro hac vice*. Bennett vs. Davis, 2 P. W. 316; Parker vs. Brook, 9 Vesey 583; Rich vs. Cockell, 9 Vesey 369; 2 Story's Eq. Ju., section 1380.

Lord Brougham in Murry vs. Barlee (3 My. and K. 209) observes as follows: "That at law, a *feme covert* cannot in any way be sued even for necessaries, is certain. Bind herself or her husband by specialty, she cannot; and although living with him and not allowed necessaries, or apart from him, whether on an insufficient allowance or

an unpaid allowance, she may so bind him that those who furnish her with subsistence may sue him, yet even in respect of these, she herself is free from all suit. This is her position of disability or immunity at law, and this is now clearly settled. Her separate existence is not contemplated—it is merged by the coverture in that of the husband, and she is no more recognized than is the *cestui que trust,* or the mortgagor; the legal estate which is the only interest the law recognizes, being in others. But in equity, the case is wholly different. Her separate existence both as it regards her liabilities and her rights, is here abundantly acknowledged—not indeed that her person can be made liable, but her property may." His Lordship goes on further to say: "In all these cases I take the foundation of the doctrine to be this: the wife has a separate estate, subject to her own control, and exempt from all other interference or authority. If she cannot effect it no one can, and the very object of the settlement which vests it in her exclusively, is to enable her to deal with it as if she were discovert."

With the utmost respect for, and deference to the opinion of this eminent jurist, I cannot but think that he has fallen into two very manifest errors in regard to this subject. It certainly cannot be insisted with any show of truth, that the "object" of these settlements to the separate use of the wife, is to give her the uncontrolled disposal of the subject matter of the settlement. I should rather incline to the opinion, that the real object is such as is generally expressed on the face of the settlement, viz: the enjoyment of the use. But this certainly does not imply the right to part with or dispose of the property so settled. The en-

joyment of the *use* may clearly exist without the right of disposal. His Lordship seems to base his argument upon the further assumption, that because these settlements are the creatures exclusively of equity, therefore the common law disabilities of the wife are removed, and that she is restored to all the powers and capacities of a *feme sole;* but I confess that I am unable to perceive the legitimacy of the deduction.

Upon every principle of sound logic, enlightened policy and strict justice, I am of the opinion that in the converse of the position assumed by the majority of the English cases, (which position has been adopted by the majority of this court in the present case,) is to be found in the correct doctrine in regard to this subject. While they assume that a married woman in respect to her separate estate is to be regarded as a *feme sole,* with the absolute dominion or power of disposal over it, except in so far as that power may be restrained by the terms of the deed or will under which she became entitled to it, I hold that she has no power to sell or dispose of her separate estate, but what is specially given to her by the very terms of the instrument under which she claims.

In arriving at this conclusion I feel that I but consult the true interests of her who occupies in society a position no less interesting than responsible—the wife and mother. So far from curtailing her rights, I desire but to add to them by shielding her from the improvidence and not unfrequently the brutality of the sterner sex. By the adoption of this rule, we would give to marriage settlements their true character, and make them what they were intended to be—a protection against the undue influence of the hus-

band, and a sure guaranty for the comfortable maintenance of the wife.

It is insisted, however, by the majority of the court, that our recent legislation in regard to the property of married women indicates very clearly the tendency of the legislative mind in favor of the adoption of the English doctrine. That the effect and tendency of the act usually denominated the "Married Woman's Law," is to free the property of the wife from the shackles which had been thrown around it by the canons of the common law, by giving her the right, with the concurrence of her husband, to dispose of it absolutely; and that this is demanded by the commercial spirit of the age.

With all proper respect for the superior intelligence of my associates, I am constrained to differ from them, both as regards the indications of the legislative mind and the practical effort of the act itself. It does not admit of a doubt, that the prime object of that act was to secure to the wife the title to her personal property. At common law, the personal estate of the wife, vested absolutely in the husband, and became subject to his control and disposal; and the statute was necessary to obviate and prevent that result, and to secure the legal title and the enjoyment of the property to the wife. This was the whole object and intention of the legislature in making that enactment. Nor is the practical effect of the statute such as the majority of the court seem to suppose it to be. So far from relieving the disposal of the property from embarrassment, it but adds to that embarrassment, by requiring the *concurrence of two minds,* where only one was before necessary. For as by the common law, the personal estate of the wife

vested absolutely in the husband *jure mariti*, he might therefore dispose of it at his mere will and pleasure, independent of her wishes; but now by the statute, the title to the property being secured to the wife, the statute provides that no disposition shall be made of it, but by the *joint act and concurrence of the two.*

If it be the intention of the court to apply the argument to property situated as this is, viz: property settled by *deed or will to the separate use of the wife,* I will only remark, that it is by no means clear that the provisions of the act were intended to reach that class of estates. The stipulations of the trusts contained in the settlement would certainly prevail, independent of the provisions of the statute. Indeed, if any deductions applicable to this discussion are to be drawn from the *spirit* of the act, it seems to me that I am strongly sustained in the view which I have taken of the law on this subject. It is admitted by all of the English Chancellors who have discussed this subject that the doctrine which I advocate, affords the more ample *protection* to the rights or the wife, and the statute certainly gives her rights, which she did not possess at common law, by *protecting* her personal property against the marital rights of the husband.

It may with some show of plausibility be replied, that the beneficent arm of equity is ever prompt to protect the weaker from the improper influences of the stronger; but there are many considerations why a resort to this source of protection, should be avoided, if possible. In the first place, the very act of applying to a court of equity for the redress of her grievances, is well calculated to engender discord and strife in the domestic circle, which not un-

frequently result in the entire disruption of the connubial tie. But even should resort be had to the protection of the court, how and by what means shall the unfortunate wife, establish her allegations of the exercise of undue influence on the part of the husband? What witness is to be found sufficiently acquainted with the private relations of the parties, to be able to drag from its secret recesses the required evidence?

The case of Grigsby vs. Cox (1 Vesey 517) furnishes a strong and melancholy illustration of the views which I am now endeavoring to enforce, and should admonish us of the danger of adopting the doctrine of the English cases which allows the wife, the full dominion over her separate estate. In that case there was a marriage settlement of an estate, in trust for the wife, to receive the rents and profits for her separate use, and as she should direct and appoint. There was no form of appointment mentioned. She by deed of appointment sold a part of the estate, without consulting her trustee, and with the concurrence of her husband. The answer of the wife in that case (*vide Belt's Supplement* 218) averred that she had executed the deeds, under the *threats and compulsion* of her husband; but the answer was unsupported by proof, and Lord Hardwicke held the purchase to be valid, and the consent of the trustees not necessary.

But it is not alone against the brutal threats of an unfeeling husband, that the wife is to be protected. The danger more frequently arises from the love, affection and mutual confidence, which ought always to characterize that delicate relation. To her who has been willing to abandon the cherished home of her childhood, the loved scenes

of joyous youth, the sacred associations of friends and relations, the warm embraces of father and mother, to cleave to the object of her heart's devotion, the sacrifice of property, interposes but a feeble barrier to a compliance with his behests; and thus the holiest impulses of her generous and confiding heart, are often converted into the deadliest foe to her domestic peace. In obedience to these generous impulses, she consents to strip herself of the comfortable support, provided by the provident solicitude of an affectionate parent, and is thrown with the pledges of connubial love, a hopeless pensioner upon the cold charity of the world. Doomed to a life of penury and want, she lingers out a miserable existence, which is to terminate only in crushed pride and blasted hopes! It is against consequences like these that I would interpose the barrier of the law; and I think that the object can be attained, only by leaving the power and capacity of the married woman, in respect to her separate estate, precisely where the common law in its wise benificence has placed it, *inability to bind herself by contract.*

Nor am I without authority of the very highest character to sanction the view which I have felt myself constrained to take in regard to this very interesting subject. Such has been the established doctrine, from an early date, in two of the oldest and most respectable States of the Confederacy; South Carolina and Pennsylvania, and such too is the current of decisions in Tennessee and Mississippi. Indeed, it is asserted by Chancellor Kent (vide 2 Kent's Com. 165, note a) that this may now be considered as the sound and prevalent *American* doctrine, and contra-distinguished from that of the English

Courts; and in this assertion he is sustained by the very able editors of White & Tudor's leading cases in equity. *Vide* Vol. 1 p. 405. This doctrine was first authoritatively announced to be the law in South Carolina, in the case of Ewing vs. Smith, (3 Dess. Eq. R. 417) and it has been strictly followed ever since, in that State. Chancellor Harper in allusion to that case (*vide* Reid vs Lamar 1 Strobh. Eq. R. 37) says: "If any thing can be considered as settled, it is the settled law of this state, that when property is given or settled to the separate use of a married woman, she has no power to charge, encumber or dispose of it, unless in so far as power to do so has been conferred on her by the instrument creating her estate, which power must be strictly pursued, in contradistinction to many English cases, in which it has been held that she is a *feme sole* with respect to her separate property, and may charge and dispose of it as she pleases, unless in so far as she is expressly restricted by the instrument. This has been the settled law since the decision in Ewing vs. Smith, followed by a great number of cases decided in conformity to it, for a period of more than thirty years, and without any decision impugning or conflicting with it."

In the case of Lyne's Executor vs. Crouse et al (1 Barr R. 114) decided by the Supreme Court of Pennsylvania, the court remarked as follows: "In Lancaster vs. Dolan, 1 Rawle, it is laid down as the rule, that a married woman has no power but what is expressly given. In the case of Thomas vs. Folwell 2 Wharton, this rule is recognized as the settled law in Pennsylvania: "That a married woman is to be deemed to possess no power in respect to her separate estate, but what is positively given or re-

served for her by the instrument creating such estate. Several other decisions of a later date recognise this doctrine. So, that whatever may be the law in other States, or in England, we must take the rule here indicated with so much conformity, as the law of this State; besides, this rule has the merit of substantial justice to support it."

This doctrine has been very elaborately discussed in the Supreme Court of the State of Tennessee and with the same result. In the case of Morgan vs. Elam, (4 Yerger R., 434,) Whyte, J., remarked in delivering his opinion: "I must confess that after the best examination that my very slender abilities permit, if it were necessary by the facts of the present case, to express an opinion decisively on this much controverted subject, I at present would say, that upon the principles upon which the doctrine is professed to be founded, and even upon the principles assigned in the cases, favoring the enlarged powers of the *feme covert*, as the ground of such determination, according to my understanding of them, but above all, from the very moving cause and design of a settlement upon a *feme covert*, her restricted powers as laid down in the settlement itself, ought, according to the plain intent therein and thereby expressed, to give the rule, and measure its extent; rejecting the subtleties of wiredrawn though able disquisition, and the entanglement of disputation, enquiry and investigation."

Green J., in his opinion delivered in the same case, remarks: "I regard this question as being unsettled in this country, and this court is under no obligation from a concurrent course of legal adjudication, to sacrifice principle to

precedent." In allusion to the argument used by Judge Platt, in his opinion in the case of Jacques vs. the Methodist Episcopal Church, (17 John R., 548,) to the effect that it is for the interest of society that the common law rule, that the husband becomes owner of all the wife's personal estate should prevail, and that therefore, it is best that such rule of construction should be adopted, as will enable the husband by the consent of his wife to possess himself of her estate, His Honor denounced it in the strongest and most indignant language. "This argument," (says he,) "is as defective in morals, as it is in sound legal principle. It defeats the prudent foresight of the settler, by enabling the husband and the wife to make a disposition of the estate, which the deed was specially intended to prevent; and at the same time it holds out an inducement of the strongest character for the husband to use undue means to obtain for himself his wife's estate." In commenting upon the various influences which may be brought to bear upon the wife, he exhibits the dangerous character of the English doctrine, in language as beautiful and chaste as it is just and true. "Surely, he remarks, a just regard for the morals of society and an honest fulfillment of the intention of the grantor, alike demand that the powers of a married woman over her separate estate, shall not extend beyond the plain meaning of the deed creating the estate." The result of his investigations in regard to this subject, is couched in the following language: "As by the common law rule, the existence of the wife is suspended during coverture, and she is rendered incapable of making any contract, it would seem to follow that when separate rights and distinct powers are conferred on her by a deed of mar-

riage settlement, that such deed should be so construed as to give her none of the powers of a *feme sole*, other than those expressly conferred by it." Catron, C. J., also concurred with Whyte and Green, remarking, "what the English doctrine is on the subject, it is difficult to ascertain. The decisions are so confused and repugnant, that Lord Eldon's complaint in Sperling vs. Rochfort, is most true, that upon all the cases taken together, it is utterly impossible to know the result."

The doctrine as thus announced, was emphatically approved in the subsequent case of Litton vs. Baldwin. (8 Humph. R., 209.)

But it is asserted by the C. J. in the opinion delivered in this case, that the case of Morgan vs. Elam and Litton vs. Baldwin, have been overruled by the subsequent case of Powell vs. Powell, (9 Humph R. 477,) and that the English doctrine now prevails in the State of Tennessee. This, in my opinion, is mere assumption. It is only necessary to refer to the case of Powell vs. Powell to perceive that the question now under discussion did not arise, even incidentally; and the loose remarks of Turley, J. in approbation of the English doctrine, must be considered in the light of mere *dicta*, and by no means entitled to the importance sought to be given to them. He does not refer, or even allude to either of these cases, but bases his remarks exclusively upon the doctrine as announced in Peacock vs. Monk and Hulme vs. Tenant. The fact is, that His Honor seems to have been either ignorant of, or had forgotten the fact, that the point had ever been decided by the Supreme Court of this State. His remarks were evidently the result of *inadvertence*. It would indeed be a

case unheard of, that so important a doctrine should be deemed to have been overruled, when the cases establishing it were not even alluded to. The only questions arising in the case of Powell vs. Powell, and the only ones which the court pretended to decide were, whether a direct conveyance from husband to wife, made upon a valuable consideration, would be sustained in equity, and whether the relinquishment by the wife of her *right of dower* in real estate, amounted to such a valuable consideration. Both of these questions were decided in the affirmative, and this is the entire sum and substance of that case. I hazard nothing in asserting that the doctrine contained in the case of Morgan vs. Elam, has been the settled law of the State of Tennessee from the date of that case to the present time.

The same doctrine was held in the Supreme Court of the State of Mississippi in the case of Doty et al. vs. Mitchell, (9 S. and M. 435,) and referred to and affirmed in the subsequent case of Montgomery vs. the Agricultural Bank (10 S. and M. 566.)

Whether any of the other States of the Confederacy have adopted this view of the law, I have been unable to ascertain, not having had sufficient access to the reports of their decisions to be able to determine.

I do not feel that I should be justified in dismissing this subject without a more special reference to the very able and lucid opinion of Chancellor Kent, delivered in the case of the M. E. Church vs. Jacques. It is true that this case was overruled on appeal to the Court of Errors of New York; and while it can be of no *authority* in that State, yet it will not fail to commend itself to our most respectful

consideration, as well from the high character of its author, as from the critical analysis, the broad and expansive views, and the logical argument with which the opinion itself abounds. As a contribution to legal science, it may well rank amongst its proudest trophies. The opinions of such a man are surely entitled to the utmost consideration, and I may therefore be pardoned for citing, somewhat at length, his remarks with respect to the result of his investigations into this very interesting question: "I apprehend," says he, "we may conclude (though I certainly do it with unfeigned diffidence, considering how great talents and learning, by a succession of distinguished men, have been exhausted upon the subject,) that the English decisions are so floating and contradictory as to leave us the liberty of adopting the true principle of these settlements. Instead of holding that the wife is a *feme sole* of all intents and purposes as to her separate property, she ought only to be deemed a *feme sole sub modo,* or to the extent of the power clearly given by the settlement. Instead of maintaining that she has an absolute power of disposition unless specially restrained by the instrument, the converse of the proposition would be more correct, that she has no power but what is specially given, and to be exercised only in the mode prescribed, if any such there be. Her incapacity is general, and the exception is to be taken strictly and to be shown in every case, because it is against the general policy and immemorial doctrine of law. These very settlements are intended to protect her weakness against her husband's power, and her maintenance against his dissipation. It is a protection which the court allows her to

assume, and her friends to give, and it ought not to be rendered illusory."

Applying the doctrine to be extracted from the foregoing views to this case, and I am at a loss to conceive upon what principle the decree of the court below can be sustained. It is true that in most of the cases referred to in support of my position, the particular question involved was as to the power of the wife, in seeking to dispose of her estate, to adopt any *other mode* than the one specially designated in the deed of settlement. In this case, however, the deed prescribes no particular mode, nor does it in terms give any power of sale. It simply conveys the property to the wife, and to the heirs of her body, coupled with the stipulation that it is "not to be subject to the control, or debts, or contracts of her husband." The court, in their argument, admit that the deed creates a separate estate for the wife, but assume that it is not within the principle of the American cases which I have referred to, and in support of that assumption, cite a casual and vague remark of Chancellor Kent upon this subject. I am willing to submit the interpretation of that remark to any candid mind, and if it does not demonstrate pretty conclusively the inclination of the Chancellor to apply the doctrine to a case even of this kind, I will freely yield the argument. Upon the *principle* assumed in all of the American cases which I have cited, I am constrained to hold, that where the deed of settlement contains no power of disposal, the *jus disponendi* cannot be exercised by the wife, at least so as to take effect during her life, and that her interest in the property is restricted to the use merely. The case from 1 Barr is one in which there was *no particular* mode of

disposition prescribed, and is in all respects similar to the case before us. It is worthy of note that none of the American cases which profess to adhere to the English doctrine upon this subject, have had the boldness to carry it out to its legitimate results, when called upon to give it a practical application. However wrong in principle the English courts may have been, it must be admitted that they have preserved the virtue of *consistency*. Holding as they do to the enlarged and unrestricted powers and capacities of the wife, they permit her not only to *alienate* but also to *charge* her separate estate, to any extent that she may desire. This is the current doctrine of those courts.

The American Courts, however, are placed in this awkward dilemma. While they profess to look upon the wife, in respect to her separate estate, as discovert, and invested with *all* the rights and capacities of a *feme sole*, for the purpose of alienating her property, they yet shrink from permitting her to *charge* it, by her *general engagements*.—In other words, they accord to her absolutely the right to alienate—part with and destroy the *entire* estate, but she may not be permitted to do an act, which by *possibility* might deprive her of a portion of it. A doctrine which involves an inconsistency so glaring, cannot command my respect, and therefore will not receive my sanction.

In closing my observations upon the branch of this case, I may be permitted to remark with reference to the precedents cited and relied upon by the majority of the court, that while age lends to truth a beauty and dignity, no accumulation of years can ever sanctify error. Influenced by this principle, the enlightened jurists of South Carolina, Pennsylvania, Tennessee and Mississippi, supported by the

approval of the great American Chancellor, have boldly repudiated the English doctrine, and I am content to be ranked as an humble follower of such worthy leaders.

In my observations upon the special point presented by this case, it will be perceived that I have left untouched many of the incidental questions which may arise out of this very delicate subject, such as the right to charge the separate estate of the wife for necessaries furnished for her use, or for expenses incurred for the benefit of the estate itself, and how and under what circumstances such charges will be allowed to be made. Also the power of the Court of Equity to *alter or change* the nature of the property, upon the application of the parties interested therein, and many others which might be readily suggested. Indeed, the question as to the charging of the separate estate, for *necessaries and outlays,* has already been adjudicated by this Court in the case of "Administrator of Smith vs. Poythress," (2 Florida R., 92) and the right is placed upon grounds which I fully approve of, and which are not at all in conflict with the general position which I have assumed in this case.

There is no conflict between the majority of the court and myself, as to whether this deed created a separate estate for the wife. It is admitted that it did, and it might therefore be deemed out of place, were I to indulge in any lengthened observations upon this point. I shall content myself by briefly remarking that there is a great diversity of opinion in the reported cases, as to what particular words will create a separate estate for the wife, but they all seem to concur in the adoption of this rule, that

where by the terms of the deed or settlement, *the intention to exclude the marital rights of the husband,* is clearly expressed or can be reasonably implied in such a case, a trust for the wife will be declared. No particular form of words is essential; the intention to exclude the legal rights of the husband, is all that is required to be shown. Clancy's Hus. and Wife, 262; 2 Bright's Hus. and Wife, 211; 2 Story's Eq. Jur., § 1381.

It was further insisted by the majority of the court, that as the settlement upon the wife was executed in the State of Alabama, (the then residence of the husband and wife,) where, it is assumed, the English doctrine prevails as the law of the land, the doctrine of *ex loci contractus* would operate, and consequently the wife enjoyed the right to deal with the property as a *feme sole,* notwithstanding her subsequent removal into this State. There are two objections to this argument. In the first place I am not satisfied that the court is correct as to the law of Alabama. It is stated in the American notes on "White and Tudor's Leading cases in Equity," (Vol. 1, p. 411,) that in the State of Alabama, some of the *earlier* cases inclined toward the English doctrine, and reference is specially made to Forest, et al. vs. Robinson, Executor, 4 Porter, 44, and to Saddler and Wife vs. Houston and Gillespie. Ibid, 208. I have carefully examined the two cases referred to and find that the broad question as made in this case, did not arise in either of them. In both of those cases, the application was on the part of a creditor to *charge* the separate estate, for the payment of *a debt of the wife.* What is said in those cases therefore, with respect to the general doctrine, must be, viewed as mere *dicta.* I have also examined all of the Al-

abama cases, from the first that was ever decided in the State, down to 6 Alabama Reports, and have found not one in which the point was expressly ruled. The case from 17 Alabama, is clearly not in point. In that case the deed of settlement provided that the wife should have "the complete control of the property, as *though the marriage had never taken place.*" A stipulation evidently in favor of the right of alienation. But even admitting the prevalence of the English doctrine in that State, yet the argument is wholly inapplicable to the case before us. It is not the Alabama contract between Tate, the settler, and Mrs. Shomo, the beneficiary, that we are now called upon to adjudicate. The contract that we have to deal with, is the *Florida* contract, made between the beneficiary of the settlement and Bobe, the purchaser of the slaves. It would certainly be extending the doctrine of *ex loci contractus*, to a most unreasonable length, to apply it to the circumstances of this case, as is sought to be done by the majority of the court. The argument, though at the first blush, somewhat specious, will upon examination, be found to be wholly untenable.

From the view which I have taken of the law of this case, it might seem unnecessary that I should refer to the testimony contained in the record, but inasmuch as the court has assumed to base its judgment, in part upon the evidence, I may be permitted very briefly to refer to it. From the cursory examination which I have given to it, I am far from being fully satisfied, that there is that conclusiveness in it, which ought always to be required, whenever it is attempted to establish the fact of dealing against a married woman. The evidence in this case very clearly

shows that, in the negotiation of the sale of the slaves, the wife had no participancy. She was never consulted by the purchaser, either as to her desire to sell, or in regard to the price to be paid, but the whole evidence conclusively shows that he dealt with the husband, as though he were the absolute owner of the property. I would not be understood as desiring to lay down any definite rule upon the subject, as each case must be made to depend upon its attendant circumstances, but I will say that where a *feme covert* is specially empowered to contract, a Court of Equity ought always to look with a jealous eye upon her dealings, with a view to protect her from the operation of improper influences. And especially ought this to be so, whenever, as in this case, the party purchasing has full knowledge of the extent of the wife's interest in the property.

If I have exceeded the limits usually assigned to a dissenting opinion, my apology may be found first, in the intrinsic importance of the question involved, and secondly, in the fact that the chief point in this case, has never before been brought under judicial investigation in this State.

I am clearly of the opinion that the decree of the Circuit Court ought to have been *reversed* and the bill ordered to be dismissed.

Upon a full review of the whole case, my mind has arrived at the following conclusions, as applicable thereto:

1st. The appointment of a trustee, is not indispensable to sustain a trust for the separate use of the wife, but where in a deed of settlement, the appointment has been

omitted, the husband will be converted into a trustee *pro hac vice.*

2nd. A married woman has no power to sell or dispose of her estate which has been settled upon her for her separate use, but what is specially given to her, by the very terms of the instrument, under which she claims.

3rd. Where the deed of settlement contains no power of disposal, the *jus desponendi* cannot be exercised by her, at least so as to take effect in her life-time, her interest in the property being restricted to the use merely.

4th. Where by the terms of the deed or settlement, *the intention to exclude the marital rights of the husband,* is clearly expressed, or can be reasonably implied, in such a case, a trust for the wife will be declared. No particular form of words is essential, the *intention* to exclude the legal rights of the husband is all that is required to be shown.

5th. In cases where the *feme covert* is specially empowered to contract, a Court of Equity will always look with a jealous eye upon her dealings, with the view to protect her from the operation of improper influences.

JOHN P. SANDERSON, APPELLANT, VS. ELIZABETH S.L. JONES, TRUSTEE, &C., MARY M. E. HARRISON ET AL., APPELLEE.

1. Where a marriage settlement is made by husband and wife *in trust to the use and behoof of husband and wife during their natural lives*, it is by no means clear that a separate estate is created for the wife.
2. The husband is entitled during his life to the income of property settled upon himself and wife jointly, as a compensation for his liability to maintain her; he is entitled to the whole of the profits of the trust estate when supporting the expenses of the household.
3. The right of alienation is incident to the ownership of property, and a restriction supposes incapacity, and is inapplicable to the case of a man.
4. Trusts are alienable, and a husband may sell and dispose of his life interest in such property.
5. A sale of personal property by a husband, under a marriage settlement as aforesaid, held good as to a daughter to the extent of the interest of the father, especially where there is no allegation that the husband has not property to maintain the wife, and does not maintain her.
6. The decree of the court in favor of the husband of the daughter against the father and grantor in the settlement, settled as aforesaid, conclusive as to his life interest, right of possession and power of alienation.
7. If the remainder-men, the children provided for after the termination of the life estate, have a fear that the property is in danger of being diverted and squandered, and they have such interests against the purchaser from the father, their remedy is by bill *quia timet*.

Appeal from a decree of the Circuit Court for Duval county.

The bill in this case was filed by Elizabeth S. L. Jones, as trustee, &c., under the marriage settlement hereinafter set forth, and Mary M. E. Harrison, wife of Robert Harrison, Senior, by her next friend, Charles P. Cooper, who

claims as *cestui que trust* under said settlement, and Robert Harrison, Junior, and others, children of said Robert Harrison and Mary M. E. Harrison, who claim as remaindermen under said settlement, complainants against Robert Harrison, Sr., and John P. Sanderson.

In the year 1813, in anticipation of a marriage between said Robert Harrison, Senior, and said Mary M. E. Harrison, then Mary M. E. Cooper, a deed of marriage settlement was executed by said Harrison and said Mary and the trustees therein named, of which the following is a copy:

Georgia:—

This indenture, tripartite, made the ninth day of June, in the year of our Lord one thousand eight hundred and thirteen, and of American independence the thirty-eighth, between Robert Harrison, Esq., of the first. Mary Magdalene Cooper, (spinster) of the county of McIntosh, the daughter of Col. John Cooper, of said county and State, of the second part, and Samuel Harrison, Jr., James Nephew, of the county of McIntosh, and William Anderson and Joseph Jones, of the county of Liberty, Esquires, of the third part. Whereas, by God's permission, a marriage is intended to be had and solemnized by and between the said Robert Harrison and Mary Magdalene Cooper. Now, this indenture witnesseth that in consideration of the said intended marriage and for securing and providing a maintenance and support for the said Mary Magdalene Cooper in case of casualties; also, in consideration of the sum of one dollar to him, the said Robert Harrison, in hand, well and truly paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged,

Hath, and by these presents doth bargain, sell, convey, assign, transfer and set over unto the said Samuel Harrison, James Nephew, William Anderson and Joseph Jones, and the survivor of them and to their heirs, executors and administrators of such survivor, all those certain sixteen negro slaves named as follows: Esau, Lydia and her child Mary, Tom, Alexander, Abraham, Drummond, Jacob, Boatswain, Stephen and Prince, Patty and her two children James and Sarah, Henry and Flood, with the issue and increase of the females.

To have and to hold all and every the said negro slaves as named, with the issue and increase of the females unto them, the said Samuel Harrison, James Nephew, William Anderson and Joseph Jones, and the survivors of them, their heirs, executors or administrators: Whereas to and for the uses, intents and purposes hereinafter mentioned, expressed and declared of, for or touching or concerning the same or any part thereof, and to and for no other use, intent or purpose whatsoever; that is to say, whereas, for the use and benefit and behoof of the said Robert Harrison, his heirs and assigns until the said intended marriage shall take effect and be solemnized, and from and immediately after the said solemnization of the intended marriage, to the use and behoof of the said Robert Harrison and Mary Magdalene Cooper, his intended wife for and during their natural lives, without any manner of waste or impeachment of waste to be had, done, made or committed, and after the determination of that estate, to the said Samuel Harrison, James Nephew, William Anderson and Joseph Jones, and the survivors and survivor of them in trust to and for the following uses, that is to say, to and for the

use and benefit and behoof of the child or children of them, the said Robert Harrison and Mary Magdalene Cooper, his intended wife, shares and share alike to them, their heirs and assigns, forever; and after the determination of that estate, to the said Samuel Harrison, James Nephew, William Anderson and Joseph Jones, and the survivors and the survivor of them in trust, that is to say, should there be no issue living by and between the said Robert Harrison and the said Mary Magdalene Cooper, his intended wife, at the decease of either of them, said Robert Harrison or the said Mary Magdalene Cooper, his intended wife, that then and in such case the said estate so made over, transferred, and assigned in trust aforesaid, shall go to the longest liver, and be to the sole use and be the right and property of the survivor, to his or her use, benefit and behoof forever, anything to the contrary notwithstanding; and whereas, the said Mary Magdalene Cooper is and will be well and sufficiently entitled of, in and to a certain estate to be hereinafter ascertained; now by these presents it is agreed upon and fully understood and hereby covenanted by and between the parties to these presents, that when such estate can and may be ascertained, that a schedule of the same shall be hereinafter annexed, attested by two or more credible witnesses, which said estate, real or personal, shall be subject to all and every the covenants, conditions, premises, trusts and limitations, as hereinbefore expressed and contained or that may hereafter be further expressed, covenanted, limited and declared, and that the said schedule so to be annexed shall be taken and considered as part and parcel of this deed of settlement, anything to the contrary notwithstanding; and by these presents

it is agreed upon, fully understood and covenanted by and between the said parties to these presents, that the said bargained, sold, conveyed, assigned and set over estate or estates, with every the rights thereto appertaining or belonging, both as real or personal or otherwise in manner and form as aforesaid, that the same, nor shall any part or parcel thereof, at any time or times hereafter, be subject or liable to the payment of any debt, judgment, execution, or account, or demand otherwise, now due or owing by the said Robert Harrison for, or by reason of any matter or thing whatsoever, or that may hereafter become due owing or be contracted, anything to the contrary notwithstanding; and it is hereby provided, covenanted and agreed by and between all the parties to these presents, that it shall and may be lawful to and for the said Robert Harrison and Mary Magdalene Cooper, his intended wife, with the approbation and assent of the said trustees or the survivors or survivor of them, at any time or times hereafter, by any writing or writings under their respective hands, and attested by two or more credible witnesses to revoke and make void, alter or change all and every of, or any of the uses, trusts or estates hereinbefore limited and declared of and concerning or touching the premises or any part or parcel thereof, anything herein contained to the contrary notwithstanding; and lastly, the said parties and each and every of them do hereby covenant, grant and agree to and with each other that the present deed of settlement, and every article, matter and thing therein contained, shall be carried into effect according to the true intent and meaning of the same, and according to the most natural and obvious construction of the words, and agree-

able to what shall appear to have been the sense and meaning of the parties at the time of executing the same, anything to the contrary notwithstanding.

"In witness whereof the said parties to these presents have hereunto set their hands and seals, the day and year first above written, 1813."

ROBERT HARRISON, [Seal.]
MARY M. COOPER, [Seal.]
JAMES NEPHEW, [Seal.]
WM. ANDERSON. [Seal.]
JOSEPH JONES, [Seal.]

"Signed, sealed and delivered in presence of
JOHN GIGNITLANT,
JAMES PELOT,
Recorded 2d July, 1822.

JOHN P. BALLARD, Clerk."

The marriage anticipated was shortly after solemnized and the parties subsequently removed to Florida whilst the latter was a province of Spain. On the fourth day of January 1844 the said Robert Harrison senior executed a deed of trust for the benefit of Mary E. Sanderson, a daughter of the said Robert Harrison senior and Mary M. E. Harrison his wife, who had intermarried with John P. Sanderson, of which the following is a copy:

"This indenture made and entered into this fourth day of January in the year of our Lord one thousand eight hundred and forty-four, by and between Robert Harrison of Nassau county and Territory of Florida of the first part, and Harrison Starrett of the County and Territory aforesaid of the second part, Witnesseth that whereas the said party of the first part in order to guard his daughter Mary

E. Sanderson as much as may be against the casualties and misfortunes of life, and provide for her a suitable and separate maintenance and support, and which will not be subject to the fate of her husband's misfortunes or enterprises in business, hath proposed for that purpose to convey the property hereinafter described, to a trustee to and for the separate use of his daughter Mary E. Sanderson, and the said Harrison Starrett party of the second part having consented to act as trustee, and the said Mary E. Sanderson having also consented to the same: Now therefore to carry into effect the said intention and to make the said conveyance Effectual in Law."

"This indenture witnesseth that the said party of the first part in consideration of the sum of ten dollars good and lawful money to him in hand paid by the said party of the second part, at and before the sealing, and delivery of these presents, the receipt whereof is hereby acknowledged hath granted, given, bargained, sold, delivered and confirmed unto the said party of the second part, his executors, administrators or assigns, all his right title and interest of, to or in the negro slaves following to wit:

1. Mitchell, male, aged 35,
2. Daniel, " " 21,
3. Richard, " " 20,
4. Edgar male aged 2
5. Roger " " 5
6. Will " " 9
7. Sarah female, " 31.
8. Nancy " " 18.
9. Betsey " " 17.
10. Fanny " " 2.
11. Harriet " " 35.

"To have and to hold the said negro slaves all and singular, together with the future increase thereof hereby,

given, granted, bargained, sold, delivered and confirmed unto the said Harrison Starrett, party of the second part his executors administrators and assigns, by as full and ample title as the same is owned by the said party of the first part, subject nevertheless to the said trusts, limitations, provisions and restrictions hereinafter contained, that is to say. In trust nevertheless, and these presents are upon the express condition that the above described property is to be owned and held by the said party of the second part, to and for the only proper use, benefit and behoof of the said Mary E. Sanderson daughter of the said party of the first part, and the heirs of her body. And the said Harrison Starrett shall have and hold the said above described property, for the uses and trusts aforesaid, and for none other whatsoever, and upon the further condition that the said negro slaves above given, granted, bargained, sold and conveyed, shall be and remain in the possession of the said Mary E. Sanderson, and her heirs aforesaid, free and secure from all debts and claims whatsoever, now subsisting or which may hereafter subsist against the said party of the first part. And the said party of the second part, by these presents for himself his executors, administrators, and assigns acknowledges and accepts, ratifies and confirms the aforesaid uses and trusts subject to all the conditions, provisions, limitations, and restrictions hereinafter expressed, and it is further expressly conditioned and agreed by the parties hereunto, that the said Harrison Starrett his executors, administrators and assigns shall and will at any time or times hereafter sell and convey the same, and at the proper expenses of the said Mary E. Sanderson, or her said heirs, make execute and deliver title or

titles to the said property mentioned, or any part or parcel of the same, whereon and in the manner and form, and such person or persons as the said Harrison Starrett trustee or his executors, administrators or assigns shall be requested or directed to do, by writing under the hands and seals of the said party of the first part and Mary E. Sanderson his daughter or her aforesaid heirs, and the said Harrison Starrett trustee, his executors, administrators, or assigns, shall upon request in manner and form aforesaid, again reinvest the money arising from the sale of any of the property aforesaid, subject nevertheless in every respect to all the provisions, uses, trusts, and conditions as those by him sold and conveyed, and the said Robert Harrison, party of the first part for himself, his heirs, executors, administrators or assigns, will warrant and defend forever the said given granted, sold and conveyed negro slaves with the future increase thereof unto the said Harrison Starrett trustee, his executors, administrators, or assigns for the uses and purposes aforesaid against all persons whatsoever.

"Signed sealed and delivered the day and year first above written."

In presence of
E. HARRISON,
ROBT. M. PEASE,
ROBT. HARRISON.

ROBERT HARRISON, [seal.]
HARRISON STARRETT. [seal.]

Subsequently to the execution of this deed of 1844, Mary E. Sanderson, the *cestui que trust,* therein died without leaving any children, and John P. Sanderson, her husband, became administrator of her estate. As such administrator, John P. Sanderson filed a bill against Robert Harrison, Sen., and H. Starrett, trustee, under the deed of 1844, for the

possession of the slaves therein conveyed. The bill having been taken for confessed for want of answer, it was afterwards decreed that said Robert Harrison, Sen., had no right, title or interest in or to the estate of said Mary E. Sanderson, deceased, and the possession of the said slaves, was directed to be delivered to the said John P. Sanderson.

The bill in this case was filed after the decree aforesaid, and it alleges that none of the parties complainant herein, were made parties to the bill filed by Sanderson, as aforesaid; that they had no day in court, although seriously prejudiced by said decree, and are consequently not bound by the same. Mary M. E. Harrison claims that under the deed of marriage settlement of 1813, she has an interest separate and distinct from her husband, in the property decreed to Sanderson under the deed of trust of 1844, of which she could not be divested by the act of her husband, and asserts that the existence of the deed of 1844, was not known to her until after the removal of the negroes therein attempted to be conveyed, from the plantation in Nassau county, where Robert Harrison Sen., and his family resided.

The bill further charges that of the negroes attempted to be conveyed by the deed of trust of 1844, two were of those conveyed by the marriage settlement of 1813; six were derived to her as an heir at law of her father, and included in the trust of 1813, as part of the estate to which she is therein declared to be "well and sufficiently entitled to," and nine were purchased or are descended from these purchased, subsequently to the deed of 1813, with the proceeds and income of the property therein conveyed.

Robert Harrison, Junior, and others, children of the said Robert Harrison, Senior, and Mary M. E. Harrison, also complainants to the bill, allege that they are entitled to an interest in remainder in said property, to take effect after the death of their parents, and charge that if the negroes are yielded up to Sanderson, under the decree rendered in the case against Robert Harrison and Starrett, their rights and interests will be jeoparded, if not wholly lost, and ask the intervention of the court to protect their rights in the premises.

Elizabeth S. L. Jones, is the executrix of Joseph Jones, the last survivor of the trustees named in the marriage settlement of 1813, and as such claims to be trustee under the said marriage settlement.

John P. Sanderson demurred to the bill of complainant, and sets forth the following as causes of demurrer, viz:

"That the complainant's said bill (in case the allegations thereto were true, which this defendant doth in no wise admit,) contains not any manner of equity whereupon he can ground any decree or give the complainants any relief or assistance as against him this defendant.

"And for further and other causes of demurrer to the said complainant's bill of complaint, this defendant, John P. Sanderson, saith that it appears by the marriage settlement referred to by complainant's bill, exhibited A, and which is by the said complainants referred to and made a part of said bill of complaint, that the heirs, executors and administrators of the said surviving trustee, Joseph Jones are necessary parties to said bill, inasmuch as it is therein stated that the said Robert Harrison did bargain, sell, convey, assign, transfer and set over the property mentioned

in the marriage settlement, (referred to in said bill as exhibit A.) to Samuel Harrison, James Nephew, William Anderson and Joseph Jones, and the survivor of them, and to the heirs, executors and administrators of each survivor, and that the said complainants have not made the said heirs of the said survivor, Joseph Jones, trustee, a party to this bill.

"And for further and other causes of demurrer to the said complainant's bill of complaint, this defendant, John P. Sanderson, saith that it appears by the said bill of complaint, that Elizabeth S. L. Jones became and is trustee in the place and instead of the original trustees named in the marriage settlement referred to and named in said bill of Mary M. E. Harrison, wife of Robert Harrison, Senior, and it also appears in and by said bill that the said Elizabeth S. L. Jones, trustee of Mary M. E. Harrison, is joined as a complainant with Chas. P. Cooper as next friend of the said Mary M. E. Harrison, and that the said Mary M. E. Harrison sues not only by the said trustee but by her next friend the said Chas. P. Cooper.

"And for further and other causes of demurrer this defendant, John P. Sanderson, saith that it appears by the said bill the same is exhibited by the said complainants against this defendant and one Robert Harrison, Senior, as defendants thereto, for several distinct matters and causes, in many whereof, as appears by the said bill, this defendant is in no way interested :

And for further and other causes of demurrer to the said bill of complaint, this defendant saith that it appears by the said bill that the same is exhibited against this defen-

dant by the said Mary M. E. Harrison, by her trustee and next friend and by Robert Harrison, Junior, in his own right and as next friend of Evelyn A. Harrison and Marion S. Harrison, as complainants thereto, for several distinct matters and causes, in many whereof, as appears by the said bill, this defendant is in no way interested, as and by reason of such distinct matters the said bill is drawn out to a considerable length, and this defendant is compelled to take a copy of the whole thereof, and by joining distinct matters together which do not depend on each other, the proceedings in the proress of the said suit will be intricate and prolix, and thus this defendant put to unnecessary charges and expenses in matters which in no way relate to or concern him.

"Wherefore and for divers and other causes of demurrer this defendant demands the judgment of this honorable court."

The demurrer being overruled, Sanderson appealed.

G. W. Call, Jr., for Appellant.

Philip Fraser and *C. P. Cooper* for appellees.

BALTZELL, C. J., delivered a opinion of the court.

This case depends upon the power of a husband, under a marriage settlement, to convey an interest in certain slaves, part of the property settled. Robert Harrison, Sr., previous to his intermarriage with his present wife, then Miss Mary M. Cooper, in connection with his intended wife, conveyed to trustees a large number of slaves, his own property, and also other property of hers "in trust to the use and behoof of himself and his wife for and during their natural lives, and after the determination of that estate in trust for the use, benefit and behoof of the child or

children of them, the said Harrison and wife, share and share alike to them, their heirs and assigns forever." This was dated 9th June, 1813.

After the intermarriage of his daughter Mary with John Sanderson, he conveyed on the 4th of January, 1844, eleven negroes to a trustee, for the only proper use, benefit and behoof of said daughter.

Mrs. Sanderson having died, her husband filed his bill asserting title to the property under the conveyance aforesaid, and by virtue of his marital rights, against Robert Harrison, Sr., and the trustee of his wife, and after hearing and argument of counsel, a decree was rendered by the Circuit Court of Duval county "that Robert Harrison, Sr., is not heir or distributee of the said Mary Sanderson, and has no right, title or interest in and to the estate of the said Mary Sanderson in remainder, reversion or otherwise and that the complainant Sanderson is entitled to the possession of said slaves," and an order was passed for their delivery to him by said Harrison.

The present bill is filed by Mrs. Harrison, wife of Robert Harrison, through the executor of the surviving trustee, and by her other children, claiming that the conveyance to Mrs. Sanderson was invalid and carried no interest to her nor to her husband, Sanderson.

This, of course, involves an inquiry into the marriage setlement between Harrison and his wife, and the nature and extent of the interest of the parties to it. It has been assumed that a separate estate is created by it for Mrs. Harrison, which we think by no means clear. The property is not settled to her sole or separate use; the words are, *"to the use, benefit and behoof of himself and wife."*

Undoubtedly, such words, applied to the wife, will not create a separate estate. Can the addition of the husband and the connection of his name make a difference ?

The books are not silent as to this subject. In an elaborate opinion delivered by C. J. Safford, of Alabama, the Supreme Court of that State say, "the property (slaves) is declared to be for the joint use and support of husband and wife and subject to their joint possession. Was any case cited in argument where, by construction, so much violence was done to the language of the deed as to maintain that a clause expressly creating an estate for the *joint use* and support of *two* was intended to create a separate property for *the sole use of one?*" Clancy, (p. 269) after a very learned investigation of the whole subject and a review of the cases, says: "All these cases clearly prove that there must be a manifest intention evinced by the language of the donor that the wife shall have the *exclusive* property in the gift, without which Courts of Equity will not suffer the legal rights of the husband to be superseded." They then say, "they come to the conclusion that this gift cannot enure to the separate use of the wife and child or either, and that the marital rights of the husband have not been excluded." Haskins vs. Coalter, 2 Porter, 473; see also Wardell vs. Chastain, 17 Con. Eng. Ch. 225; Ibid, 9 Simon 525.

A reference is given in a note to Hill's work on Trusts, p. 420, n. by Wh. to Bender vs. Reynolds, 12 Ala., 441 and Geyer vs. Br. Bank, 21 Ala., 414, but we have not been able to procure them. 4 Ired. Eq. 241.

It may be proper to remark that more stringent expressions would seem to be required by the latter authorities to

create a separate estate, than once were considered sufficient. Hill on Trusts by Wh., 611.

Even if the wife have a separate estate the inquiry arises, as to the interest of the husband, Robert Harrison in the property conveyed, and the broad ground has been assumed that he had none that he could convey. It is very clear that he has an interest if she had one, and if he has none she is in the same condition. The authorities as to the relative rights of the two parties will be found to be as follows: "Where property belonging to the husband and of which he is the purchaser, by setlement is vested in trustees in trust, to pay the income to the husband and wife jointly during their joint lives, the husband alone will be entitled to receive the whole income." Hill on Trusts, 427; Duncan vs. Campbell, 12 Simons 616.

"A husband in equity as well as at law is entitled to the receipt of the income of his wife's property as a compensation for his liability to maintain her." Hill on trusts 410 n. 3 Simons 370; 1 Roper Hus. and Wife, 273.

"Consequently he will be entitled to the uncontrolled beneficial enjoyment of her life interest unless he deserts her." Hill 410.

In Jones vs. Mayrant the Court of Appeals of South Carolina, say "it was decided in Barrett vs. Barrett, that the husband supporting the expenses of the household was entitled to the whole of the profits of the trust estate settled jointly on the husband and his wife. Under such a settlement the creditors of the wife would not be allowed to deprive the wife of her maintenance." 4 Dees. 602. In the case of Napier vs. Wightman the same court say "this setlement provides that the defendant Wm. J.

and his wife shall have the whole of this estate (slaves, &c.) during their joint lives *without assigning* any part to her separate use, and if it be true, and that will not be controverted that all the chattel interests of the wife, belong to the husband, he is entitled to the whole income of this estate so long as they both live, and if arrested on a *Ca. Sa.* from a court of law would be required to assign." 1 Spears Eq. 369.

The terms of the deed were to trustees in trust for the joint use of husband and wife, during their joint lives, then to the use of survivor during life &c. The same court says farther in the same case: "I shall not stop here to enquire whether under the statutes of uses the defendant Wightman has not a vested interest in the whole of the real estate during life. It is very clear that under the provision in the settlement, *he is entitled to the income of the whole estate, real and personal, for the joint lives of himself and wife, and during his life if he survives,* with power of disposition as to one half absolutely. Ibid, p. 370.

Whilst then we have seen that Harrison had an interest in the trust estate, the question yet arises as to his power to convey, which also has been earnestly and seriously denied and questioned. In the case of Shomo vs. Bobe decided at the present term, we had occasion to express our views on the subject of alienation in general, and we desire to refer to them in connection with this case.

On this subject before referring to authorities more directly in point, it may be well to refer to the general law as well as to the reasons for its existence. "A conveyance to B. in trust or for the use of C., or where only the equitable title passes as in case of a conveyance to B. to the use

of C. in trust for D. The trust in this last case is executed in D. though he has not the legal estate." 4 Kent 305.

Our own Legislature in the law passed to secure the rights of married women gives the right of disposal to the man and wife. We will add that in speaking of the power of alienation, Blackstone says: "we must consider rather the incapacity than capacity of the several parties, for all persons in possession are *prima facie* capable of conveying and purchasing, unless the law has laid them under peculiar disabilities," &c. and among these he enumerates persons attained of treason, idiots, &c. &c. 2 Black. Com. 290.

Whilst such is the general rule, we shall find no diversity as to the particular subject of inquiry. "A perpetuity will no more be tolerated when it is covered with a trust, than when it displays itself undisguised in a settlement of the legal estate." 1 Lewis on Trust, 138.

"It is absolutely against the constant course of Chancery to decree a perpetuity, or give any relief in that case. 1 Chan. Reports, 144; 5 Jac. Law Dic., 143.

Blackstone in his commentaries, speaking of the changes made by courts of equity in the doctrine of uses, says: "They have raised a new system of national jurisprudence by which trusts are made to answer in general, all the beneficial ends of uses, without their inconvenience and frauds. The trust will descend, may be alienable, is liable to debts, to executions on judgments, &c." 2 Black. Coms., 337.

"The *prima facie* rules of trusts, is that the intention of the settler shall be carried into effect, but the intention cannot

be pursued when it contravenes the public policy of the law." "So trusts cannot be created with a proviso that the interest of the *cestui que trust* shall not be aliened, or shall not be subject to the claims of creditors. If it can only be ascertained that the *cestui que trust,* was intended to take a vested interest, the mode in which, or the time when the *cestui que trust* was to reap the benefit, is perfectly immeterial, the entire interest may either be disposed of by the *act of the cestui que trust,* or may become vested in his assignees by operation of law." Lewis on Trusts, 137-8; 6 Simon, 524; 1 R. and W., 395; 1 Simon, 66; 18 Vesey, 429.

In one of these cases, the Lord Chancellor says, "there is no doubt, generally speaking, that if property is given to a man for his life, the donor cannot take away the incident to a life estate. Equity making a *feme* the owner of it, and enabling her as a married woman to alien, might limit her power over it, but the case of *a disposition to a man,* who if he has the property has the power of aliening, *is quite different.*" 6 Simon, 434.

"A trust is assignable. An equitable interest may be assigned, though it be a mere possibility, and either with or without the intervention of the trustee, and the assignee of the *cestui que trust* may call upon the trustee to convey to him, and on his refusal may file a bill to compel a conveyance without making the assignor a party." Lewin on Trusts, 499; Philips vs. Bridges, 3 Vesey, 127; Goodear vs. Ellison, 3 Russ. 583.

In Lady Arundel vs. Phipps, which was a settlement to the use of Lord and Lady Arundel for their lives and the life of the surivor, Lady Arundel became equitable owner

of goods and chattels, and she became so under a contract of purchase which she insisted she was entitled to make with her husband himself, and her purchase was sustained against the creditors of the husband. 10 Vesey, 140-7-8.

In Ford, trustee, vs. Caldwell, the deed conveyed to the joint use of husband and wife for life, not subject to their debts, and after the death of either, to the use of the survivor for life, and after the death of the survivor to the use of the children of the marriage. Speaking of this state of facts, the Supreme Court of South Carolina, Judge O'Neill pronouncing the opinion of the court, says: "I hold, the trust was executed in the husband, at least for his life. For, according to the deed, he was entitled to the posession of the slaves; having this, he had both the legal and equitable estate for his life. For the trustee had nothing to do with it during this time, he had delivered the slave to one who was under no legal disabilities; this was equivalent to a conveyance to him for the time he was to possess it. For the condition annexed to the trust, not to be subject to the debts or contracts of the husband and wife, is void. The husband having both the legal and equitable estate *could transfer it, which he did,* to Chur." The general property was in Ford, trustee, but he had parted with the right to possess it to the *cestui que trusts,* Swift and wife, for life. At law, the wife's being and rights are merged in the husband, and hence his possession for the joint use of himself and wife for life, made the property for that time his entire qualified legal estate. This was a suit at law instituted by trustee against the purchaser. 3 Hill, 429.

In Love vs. Hodges, which was to a trustee for husband and wife, the same court quote the same case as

follows: "In personal estate the legal estate remains in the trustee until he executes the trust by delivering the possession to one capable of holding in himself a legal estate in the property to the extent of the interest intended to be conferred by the deed. In this case the trustee had nothing to do with the property during the life of the husband. He had delivered the slave to one who was under no legal disability. This was equivalent to a conveyance to him for the time he was to possess it." 1 Spears, 596.

An idea prevails that though the income and profits may be assigned, yet the body, the *corpus* of the estate, may not be. If this be the case, we have not perceived it in the general rule stated nor in the particular cases cited.

There is another aspect of the case worthy of consideration. Suppose a decree made in favor of Mrs. Harrison, as contended for, and the property restored, who would take the possession, who be entitled to the income during the life of Harrison? The answer is not a difficult one, the husband, Harrison himself, and no other person, so that the suit may be regarded, and properly cannot be regarded in any other light, than as one instituted by him and for his benefit against his own assignee.

Were these authorities less clear and satisfactory than they seem to us to be, we yet think the decree in favor of Sanderson against Harrison conclusive as far as his possession of the property, his interest in it and his power of alienation are concerned. It was the decision of a court of competent jurisdiction as to these issues on the subject itself, and whether erroneous or not it constitutes the law of the case. We shall not undertake to say that this decision is conclusive on Mrs. Harrison in every possible

aspect of the case. It is sufficient that the facts presented by the record do not remove such conclusion. As far as the facts of this case are concerned, we have possession by the husband of the trust property for near forty years to the present time—thirty years prior to the transfer to Mrs. Sanderson, with receipt by him of the income, profits, &c., without interference by the trustees, alienation by the father and husband so possessed to his daughter, possession by the latter and the right of her husband confirmed and established by decree of the court.

As far as the law is concerned, we find Robert Harrison, the husband, rightly entitled to the possession of the property, to the income and profits arising from it,—that he had a right to sell to the extent of his interest, and his assignee to hold it.

We have not returned to the fact that the assignment to Mrs. Sanderson does not conflict with the main design of the deed of trust, but is merely in advance of it. The children of the marriage are expressly provided for in the settlement. Nor is the case altered by the fact, that by the dispensation of Providence the husband, rather than the wife, is before us claiming the benefit of the last settlement. He has been decided to be entitled to her rights and interests, and is entitled to the same favorable consideration that she would be if contending for the property herself.

It remains to dispose of the case as far as the children of Mrs. Harrison are concerned, who claim the remaining interest after the termination of the life estate. The question of their interest can only be before us for one purpose, and that is for the protection of the property, so

that they may assert their interest when it comes into existence. This they may be entitled to obtain from the court, on a proper showing by a bill *quia timet.* If the property is in danger of being diverted and squandered, and they have the interest contended for as against Sanderson, they may obtain relief from the court. 1 Story Eq., §827. Osborne vs. VanHorn, 2 Fla. 361.

We have not considered whether, if Robert Harrison, by any casualty should become unable to support his wife, she might not have a right to call upon Sanderson to contribute to the extent of his interest. Such case has not been presented by the proof nor the pleadings, nor have we thought proper to determine the question of her right in the event of his death and her surviving. These questions will be appropriately decided when properly presented.

The decree of the Circuit Court overruling the demurrer will be reversed and set aside, and the case remanded with directions to dismiss the bill of complaint and dissolve the injunction without prejudice to other rights and interests than those now determined.

DuPONT, J. Delivered the following

DISSENTING OPINION.

The demurrer in this case raised numerous interesting questions, both with respect to the form and substance of the bill, all of which were very elaborately and ably argued by the counsel engaged on either side. In the opinion delivered by the Chief Justice as the opinion of the court, there is no reference to the points made by counsel in regard to the form of the bill, but the views of the court are confined exclusively to the substance. In em-

bodying my *dissent,* which reaches as well to the judgment pronounced, as to the reasoning upon which that judgment is founded, I shall restrict myself entirely to the positions assumed in the opinion, and pass by the points made by counsel, without reference thereto any further than may be necessary to elucidate or give consistency to my views. I have endeavored to analyze the opinion and to extract from it the distinct propositions, upon which the argument seems to be based and these several propositions. I shall now proceed to notice in the order in which they occur.

First. It is assumed in the opinion, that the words of the deed of settlement, executed in anticipation of her intermarriage with the defendant Robert Harrison, did not create a separate estate for Mrs. Harrison, and the following words quoted from the deed of settlement are referred to in support of that position, viz: *"to the use, benefit and behoof of himself and wife."*

I readily admit that such words do not ordinarily, according to the authorities, create a separate estate for the wife, they not implying by themselves, an intention to exclude the marital rights of the husband. The doctrine on this subject depends, for the most part, upon implication and construction. The rule is, that where by the terms of the deed, or settlement, the *intention to exclude the marital rights of the husband,* is already expressed, or can be reasonably implied, in such case a *trust* for the wife will be declared. No particular form of words is essential; the intention to exclude the marital rights of the husband is all that is required to be shown. Clancy on Hus. and Wife 262, 2 Bright's Hus. and Wife, 211, 2 Story's Eq. Ju. §1381.

Now supposing that there were no *other* words in this deed defining the objects of the settlement, and the intention of the grantor, than those quoted by the court, is no implication to be deduced from the fact that the *husband himself* was the settler or grantor? What object other than the *exclusion of his marital rights* could have induced him to execute the deed? If the property, notwithstanding the solemn execution of this marriage settlement, was still to be subject to the marital or common law rights of the husband, then the deed was wholly nugatory; nay, it became a solemn mockery, a ridiculous farce, a heartless *fraud,* perpetrated at the very base of the hymenial altar, and in the immediate presence of the great I AM ! !

The case of Tyrrel vs. Hope (2 Atk. R. 558) is directly in point and fully sustains me in this view. Lord Hardwicke held that a promise in writing from the intended husband to the intended wife, that "she should receive and enjoy the issues and profits of one moiety of the estate then in the possession of her mother, after the decease of her mother," gave to the wife an estate to her separate use. Such assuredly would not have been the effect and operation of those words, had the settlement been made by a third party; but being made by the intended husband, his Lordship said that the stipulation could bear no other construction, although the words "separate use" were not to be found in it, for as he very justly remarked, to what end should she receive the rents and profits, if they became the property of the husband the next moment? Upon the same principle it is, that gifts and presents from the husband to the wife, though made after marriage, will be supported in equity against himself and his representatives;

and such gifts will be considered as the wife's separate *property.* (*Vide* Atherly on Marriage Settlements 231, citing Lucas vs. Lucas 1 Atk. R. 270.) Now it is clear that all gift's or present's to the wife of personal property, made in a third party or stranger, where there is no *express* stipulation that it shall be to her separate use, becomes immediately the property of the husband, jure mariti. But the gift being made *by the husband,* the conclusion of law is, that it was his *intention* that it should enure to her separate use. *Vide* Steel vs. Steel 1 Ind. Eq. R., 452, cited in Hill on Trustees 420, (margin) where it is held "that a conveyance by a *husband* in trust for his wife, will also be necessarily for her *separate use;* otherwise the disposition would be futile."

But there *are* other words to be found in this deed (not noticed or referred to in the opinion of the court,) which conclusively settles the interpretation to be given to the deed of settlement. It is expressly provided that "the property conveyed is not to be liable to the payment of any debt, judgment, execution, account demand *or otherwise,*" of the husband, and this stipulation is coupled with a proviso "that the husband and wife, with the approbation and assent of the trustees, may at any time, by writing or writings under their respective hands, and attested by two or more credible witnesses, revoke, and make void, alter and change, all and every of, or any of the trusts or estates hereinbefore limited &c." Now if these two stipulations, do not each of them clearly indicate the *intention* to exclude the marital or common law rights of the husband, (and that is all that is required, in order to create a sepa-

rate estate for the wife) then I confess that I am unable to appreciate the import of language.

The position of the court, however, seems to be based upon this view, that because the settlement is to the *joint* use of husband and wife, therefore no *separate* estate could be created in the property. In the language of the authority cited from 2 Porter, "the wife must have the *exclusive* property in the gift, without which Courts of Equity will not suffer the legal rights of the husband to be superceded." If by the phrase "*exclusive* property," it is intended to assert that the wife may not enjoy a "*separate* estate" *jointly* with the husband, then it is very manifest that the error of the position originates in the confounding of the two terms "separate estate" and "estate in severalty." These several terms have each a precise technical meaning, and the existence of the latter is by no means dependant upon the former. By the term "separate estate" I understand to be meant, such an estate as may be enjoyed by the wife, exempted from the marital or common law rights of the husband, and that such enjoyment by the wife may be either in *severalty* or *joint-tenancy*. Indeed, the books of reports are full of such cases. The authority of 2 Porter, cited to this point in the opinion delivered by the court, I have examined and find it to be a case in which the deed, under which the wife claimed, conveyed a strictly *legal* title, and consequently it can have no bearing on the case under consideration. A "separate estate" is exclusively the creature of equity, and when the deed conveys the *legal* title to the wife, *eo instanti*, the property, if it be personalty, becomes according to the rules of the common law, the property of the husband. In the case cited, the

property was conveyed directly to the wife by her father but to be held "to the only proper use and behoof of the husband and wife during their joint lives, and to remain in their joint use and possession, for the use and support of the said Rachel and James, (husband and wife) and none others." It is very clear that the terms of the deed created a purely *legal* estate in the husband and wife, there being no words from which an intention to exclude the common law rights, of the husband could be inferred.

The question raised in the case cited from 9 Simons was simply, whether the words of the deed created a separate estate for the wife, and is as dissimiliar in the facts as it is inapplicable to the law of this case.

I have been equally unfortunate with the court, in not having been able to procure access to the two cases cited to the same point from 12 and 21 Alabama R. and also 4 Ired.; but I will venture the assertion, that although in those cases the property may have been settled to the *joint use* of the husband and wife, yet upon examination it will be found that there were no words in the deed expressly excluding the marital or common law rights of the husband, or from which such intention could be reasonably implied.

I am forced then to the conclusion, with all proper deference to the opinions of my respected associates, that the deed of settlement executed by the defendant, Harrison, in contemplation of his marriage with the complainant, Mary E. Harrison, did create in her a *separate estate,* to be enjoyed by her *jointly* with her husband, free from the operation of his marital or common law rights.

The position is assumed by the court, secondly, that the

settlement being to the *joint use* of the husband and wife, he (Harrison) was entitled to receive the issues and profits of the property, and *consequently* had the right to dispose of the *corpus* of the estate. The language of the court on this point is as follows: "even if the wife have a separate estate, the enquiry arises as to the interest of the husband Robert Harrison in the property conveyed; and the broad ground has been taken that he had none that he could convey. It is very clear that he has an interest if she has one, and if he has none she is in the same condition." The court then proceed to cite authorities to show that where the property has been settled to the *joint use* of husband and wife, he is entitled to receive the income of the same.

It is a misapprehension on the part of the court to suppose that there has been any denial of the position, that Harrison has an *assignable interest* in the property. It is admitted that he has, but the question is as to the *quality and extent* of that interest. Without intending to admit the applicability of the authorities cited to this point, I readily accord to the husband the right to receive the *issues and profits* of an estate settled as this is; and I moreover yield to him the right to dispose of *them* (i. e. the issues and profits) provided such disposition do not defeat or impair the object and design of the settlement; but I do contest his right to alienate the *corpus* of the estate. His interest in the property is only a *joint use,* and he may not assign a larger estate than he has under the deed of settlement; the entire *corpus* of the estate must remain intact. (vide Blake vs. Irwin, 5 Geo. R. 345; Cadogan vs. Kennett, Cowper's R. 432). In this latter case the court remark: "If Lord Montford had left his house wtih the furniture, or if

the rent could be apportioned, the creditors would be entitled to the *rent,* but they have no right to take the goods themselves; the possession of them belongs to the trustees."

I have not had access to the cases cited in the opinion from 3 and 12 Simons, but have examined those cited from 4 Dess., and 1 Speer, and I find that they both fully sustain the view that I have taken of this question.

The case of James vs. Marant, 4 Dess. R., 591, was upon a bill filed by a creditor, to subject the *"profits and proceeds"* of trust property, settled to the separate use of the wife, to the payment of a debt incurred for the benefit of the estate. There was no attempt to reach the corpus of the estate, the prayer of the bill asking only to subject the *"profits and proceeds,"* and the decree of the court was according to the prayer, that the trustee do account with the complainant, before the commissioner for the annual income of the trust estate, until the debt be paid." In the quotation from the opinion delivered in that case, and cited by this court, it is said "under such a settlement the creditors of the husband, would not be allowed to deprive the wife of her maintainance," and if not, I may ask upon what ground will it be permitted to a party, with full *notice* and without a *valuable consideration,* to take to himself the corpus of the estate, out of which that maintainance is to accrue?

The case of Napier vs. Wightman, (1 Speer Eq. R., 357,) also cited in the opinion of the majority, is a very strong authority in support of my views on this point. In that case, it was determined that the deed *was not a marriage settlement,* and further, that there was no *separate estate*

created by it, but that the trust was for the *joint use* of the husband and wife, *and not exempted from his marital rights;* and yet, notwithstanding the existence of the legal rights of the husband to control and appropriate the *proceeds* of the estate, inasmuch as the deed created a *trust,* the court very properly refused to go further than to subject the *income* of the *estate,* for the joint lives of the husband and wife, and one-half of the personalty, *saving the life of the wife,* to the payment of the husband's debts. No stronger case than this need be cited to support my position.

A third and the main position assumed in this opinion is, that the trust becoming *executed* in the husband, by the delivery of the *possession,* he thereby acquired the legal estate, and consequently the right to convey it.

There is doubtless much refined learning upon this very subtle subject of executory and executed trusts, and with the principles of the decided cases for our only guide, it not unfrequently becomes somewhat difficult to determine when a trust has been executed, or is only executory. But however true this may be in respect to ordinary trusts, I will venture the assertion, that in regard to trusts arising under marriage settlements, where a *separate estate* is created for the benefit of the wife, (whether that estate is to be enjoyed by her in *severalty,* or as a *joint usee* with her husband,) the doctrine that the delivery of the possession operates as an execution of the trust does not obtain.

As applicable to the facts of this case, it may be further observed, that the refinements and complications attending conveyances, or devises to uses, are confined to assurances of real estates, and are seldom encountered where the subject of the settlement is of personalty. (Vide Watson vs.

Pitts, cited in 1 Speer's Eq. R., 587.) It seems also that the intention of the settler, as it may be gathered from the terms of the instrument, ought to prevail. If the object and design of the settlement will be defeated by the application of the doctrine, it will not be permitted. Hill on Trustees, 233.

In the case of Harton vs. Harton, 7 T. R., 652, which was a settlement in trust for a *feme covert,* to permit her to receive the rents for her separate use, Lord Kenyon held that in order to effectuate the testator's *intention,* the legal estate must be declared to reside in the trustees; otherwise, if the trusts were held to have been *executed* in her, the husband would be entitled to receive the profits, and so defeat the object of the devisor.

As specially applicable to the point now under review, I refer to the case of Blake vs. Irwin, 3 Georgia R., 345, the facts of which are made to coincide with those of this case, in a most remarkable degree. That case, like this, arose out of a marriage settlement—the property was vested in trustees, to be held in trust for the use of *the husband* during his life. He was to have the entire possession, and to exercise reasonable ownership over the property, and to alter and change the same, by and with the consent of the trustees, provided it was for the benefit of the trust estate. If the wife survived the husband, then she was to have the entire use during her natural life, with the power of disposing of one half thereof by will, and in the event, of offspring between them, the whole estate to vest in the child or children, the trustees to have a right at any time with the consent of both husband and wife, to re-settle the

property. It will be perceived that this is not as strong a case in one material particular, as the case before us.

In the case under consideration, the property was settled in the first place (immediately after the consummation of the marriage) to the *joint use* of Harrison and wife for life; in the case cited, it was so settled to the *separate* use of the husband. The *corpus* of the estate was levied upon under common law process, for the husband's debts, and after the most searching and elaborate argument of able counsel on both sides, it was held that "the legal title remained in the trustees, and that the equitable interest of the husband in the property was not liable to be seized and sold by the Sheriff, under an execution at law, but that the proper remedy for the creditors was in a Court of Equity." The position assumed by my respected associate was critically examined by both the counsel and court, and indeed was the only one upon which the plaintiff in execution relied. Judge Lumpkin, in a very able opinion delivered in the case, has set forth the true doctrine in so clear a light, that I need do no more than quote his language. "In behalf of the creditors," says he, "it is insisted that even if the statute of uses and the 10th section of the statute of frauds, did not apply to personalty, that still the very deed itself conveys the possession to the use, and transfers the use into possession, thereby making Blake the complete owner of the property, as well in law as in equity. It is true that the entire use is given to him, but it is the *use* only and not the *corpus*. It is also true that he is entitled to the possession, but that possession is evidently not an inherent right by virtue of the estate which he held, but bestowed upon him as an agent rather of the trustees." Again, he re-

marks, "It is difficult to lay down a distinct rule showing when a trust is and when it is not executed. The cases of Cardwardine vs. Cardwardine, 1 Eden R. 33, and Leicester vs. Leicester, 2 Taunt. R. 109, would prove that it is not sufficient to prevent the estate from being executed, that the trustee has something to do; but it would seem that whenever the object of the trusts would be defeated by its being executed, as in cases of trusts for married women, or to preserve contingent remainders, or where the trustee has some discretion to be exercised in relation to the estate, or where there is some object to be effected by the estate remaining in the trustee, that in all such cases the instrument will be construed not to convey and execute trust. And he cites to this point Posey vs. Cooke. 1 Hill R. 414, Laurens vs. Jenny et al. 1 Speers L. R. 366. McIntyre vs. Agricultural Bank et al.; 1 Hills Ch. R. 111.

His honor goes on further to remark, "marriage settlements have the sanction of immemorial usage and of the most enlightened part of the human race; and this Court would be recreant to its duty, to permit the rules of law to be strained to defeat the end to which this contract was intended. It is true that the use of this property is given to the husband for life, but then he cannot alien without the consent of the trustees, and for the advantage of the wife of a maintenance, even if he derived it out of this property. Her interests, therefore, are essentially protected by this deed, independently of the power reserved of resettling the estate. To allow it then to be sold at law, to pay the husband's debts, would be to defeat the very end for which the trust was created."

With how much greater force will this reasoning apply (as in the case before us) to a party who claims against the trust, not as a creditor, nor as a *bona fide* purchaser without notice, but as a mere *volunteer* with full notice of the trust, and without having given any *value* for the title.

This doctrine of executed trusts was again brought under review in the same Court, in the case of Wynn vs. Lee, 5 Geo. R. 217, and the case of Blake vs. Irwin was referred to and approved. Nisbet J. in delivering the opinion of the Court remarks: "The defendant in the Court below insisted that Mrs. McMillan, the *cestui que trust*, having possession of this slave from her trustee, Lee, the deed of trust was executed, and that he as trustee, could not maintain trover for him. The Circuit Judge disaffirmed this doctrine, and so do we. The legal estate was in the trustee; of that, he had never been divested. The trust was not alone for Mrs. McMillan; it was also for her children. It was not a trust consummated when the slave was delivered in her possession. She would not, by a sale defeat the limitation over to the children. The trustee held the legal title for the purposes of the trust, and was entitled to the possession as against strangers to the deed, at law, as against Mrs. McMillan herself. We think the Court was right in sustaining the action." (Citing Lewin on Trusts, 247 and 481; Willis on Trustees, 72, 73, 77, 84, 109, 482; Blake vs. Irwin, 3 Geo. R. 345; Hill on Trustees, 274; Goodtitle vs. Jones, 7 T. R. 47., 4 Barn & Ald. 745, and Jones vs. Jones, 3 Bro. C. C. 80.)

But I need invoke no stronger authority to sustain my position, than the cases from South Carolina, cited to this point in the opinion of the majority. The views expressed by Judge

O'Neall in deciding the case of Ford vs. Caldwell, do seem to favor the doctrine contended for by this court; but it will be seen by reference to his honor's opinion delivered in the cases of Rice vs. Burnett and Joor vs. Hodges, afterwards decided in the Court of Appeals of South Carolina, (1 Speer's Eq. R. 602) that he took occasion to modify and limit those views very much, if indeed he did not recant them altogether. With respect to these two cases he remarks: "In these cases I concur in the judgment of the court, by which the motion is dismissed in the first case, and the decree is reversed in the second, but I came to my decision for reasons different from those mentioned by my brother (Chancellor Dunkin) in the judgment just read. I still adhere to the doctrine, that a trust in personalty, is a mere bailment, and that it is executed, *exactly according to the purpose intended by the donor,* and to the extent pointed out in the deed, by the delivery of the possession to the *cestui que trust.*"

After proceeding to enforce this position in an elaborate argument and by the citation of numerous authorities, he closes by remarking in reference to the cases which had been just decided. "So much for the principle which I suppose these cases are to overturn. In the cases themselves according to the principles which I have maintained, there is no difficulty. In both *the trust is partially for a married woman,* incapable of acting *sui juris,* something still remains to be done by the trustee, showing that the possession is not absolutely in the husband. Both are antenuptial settlements. In the first case, the property may be sold by the trustee and the *cestui que trusts* and the proceeds invested in other property. This shows that the

possession was to be permissive only, a mere tenancy at will, if we can properly use such terms about personality. In the other case, at the death of each, he is to assign, transfer and set over the property to the next one entitled. This also qualifies the possession. But it is said that this conflicts with Ford vs. Caldwell, it does not so seem to me. There the settlement was post-nuptial, the possession was never changed, it was in the husband all along; there was nothing to be done by the trustee, for the life of the husband. His possession was absolute for his life and when he sold the slaves, I do not see how the trustee could recover them from his alienee. So far as he and the trustee were concerned, the trust was executed and that was all that case decided."

It is very evident from the tenor of these remarks that his honor did not intend to be understood as sanctioning the doctrine, to the extent to which it has been carried by the majority of the court, in this case, if indeed, he did not expressly *repudiate* such an application of it. But however, that may be, it is quite certain that this doctrine, as thought to be announced in Ford vs. Caldwell was expressly overruled, in the two cases of Rice vs. Burnett (1 Speers Eq. R. 590) and Joor vs. Hodges (Ib. 593.)

Chancellor Dunkin in a very elaborate and well considered opinion, delivered in the former case, reviewed the whole doctrine of executed trusts, and expressly repudiated the principles assumed in the case, of Ford vs. Caldwell, as the ground of the judgment rendered therein. He remarks: "So in Ford Trustee. vs. Caldwell, the deed was a gross fraud upon creditors and void by the common law,

but a majority of this court is of opinion that *it cannot be safely rested upon the principles therein assumed.* For myself I think it best that the rules of the common law, and the practice of the country, as I suppose it to have existed until 1832 should prevail. Deeds of this character should be construed according to their plain intent and meaning. The legal estate should continue in the person to whom it is transferred, until the property is to be delivered to those for whom an absolute estate is provided. If those who are entitled to the intermediate use for life or years, should attempt to remove or destroy the property, there exists no good reason why he, to whom the legal estate was transferred, and probably in reference to these very contingencies, should not have the authority promptly to interfere to assert his legal rights and prevent the destruction of the trust property. If on the other hand those entitled to the equitable use for life, or any other equitable interest are indebted, their creditors should resort to the appropriate forum. If creditors were compelled to come into inquity, for the purpose of making the husband's interest liable, there are various equities by which their claims might be rebutted."

It will thus be seen that the principle, as thought to be announced in Ford vs. Caldwell, which is chiefly relied on by this court, as the ground of their judgment in this case, if not repudiated by Judge O'Neall (and I think it is) has been emphatically rejected by the subsequent decisions, of the same court. And I may add that all of the foregoing remarks, of the learned Chancellor, with respect to *creditors,* will apply with ten-fold force to a mere *volunteer pur-*

chaser, as is the claimant in the present case, *according to the admission of the demurrer.*

I have also the authority of Chancellor Harper to support my position. It is true that when the case of Joor vs. Hodges came before him at *chambers,* he decided it in accordance with the doctrine contended for by this court, but in doing so he showed his disapprobation of the doctrine in a most marked and emphatic manner, and took occasion to declare that he made the decision under the pressure of the *decided cases,* and it was at his instance that the point was carried before the appellate tribunal for review. After commenting upon the several cases which had been previously decided by the Court of Appeals of South Carolina, (Ford vs. Caldwell amongst the rest) in which it was supposed that the doctrine had been sanctioned, he very significantly remarks: "If indeed when property is conveyed in trust, for the joint use of husband and wife for life, the use is to be executed in the husband, so as to render it liable at law to his creditors." I do not perceive what purpose is answered, by having a trustee to a marriage settlement." He then closes his opinion with the following observations: "But still if the execution of the trust depends on the right of possession, and the actual possession, I must, according to the cases decided, declare it to be so executed in this instance, so as to render it liable to creditors at law. It is said in Pyron vs. Mood, that in equity, if the purchasers had notice of the trusts, the rights of the wife might possibly be protected. But if the property be liable at law, I know of no ground on which equity could interfere. I am bound to follow the law. *I am not well satisfied with my conclusion,* and wish

that it may be revised by an appellate tribunal. 1 Speer's Ep. R. 597-8.

I have been unable to discover the relevancy of the several citations from Kent, Blackstone, Lewin on Trusts, and others, in reference to "conditional estates" and "perpetuities," and therefore do not appreciate their force as applied to the facts of this case. If it were intended by these citations to intimate that the estate created by the deed of settlement in this case, contains any one element of either a "conditional estate" or a "perpetuity," I can only observe that, in my opinion, it is clearly a misapprehension of the purport, design and legal effect of the deed.

The next position assumed in the opinion of the court is, that this suit is to be regarded as instituted by Harrison (the husband) for his own benefit. By what process the court have arrived at this conclusion, I am unable to perceive. Harrison is a defendant in the bill and not a complainant. No *answer* has been filed that I am aware of, but the case comes before us simply upon general *demurrer,* and we are therefore bound to take the facts to be as they are stated in the bill. Besides, if it be permitted to the court to advert to *presumptions,* it seems to me that the *legal* presumption would be, *that it was his interest to protect his own conveyance."*

In order that I may not misrepresent the views of the court as set forth upon another distinct branch of the cause, I will quote the language of the opinion in reference to that point: "The decree," say the court, "in favor of Sanderson against Harrison is *conclusive* as far as his possession of the property, his interest in it, and his power of alienation are concerned. It was the decision of a court of compe-

tent jurisdiction as to the issues on the subject itself, and whether erroneous or not it constitutes the law of the case. We shall not undertake to say that this decision is conclusive on Mrs. Harrison *in every possible aspect of the case.* It is sufficient that the facts presented by the record do not remove such conclusion."

It must be recollected that neither Mrs. Harrison or any other of the complainants in this case were *parties* to the suit, in which that decree was rendered; and it certainly will not be required of me to invoke the aid of authority to show that no person can ever be concluded by a decree, unless he were a party thereto, or a privy in estate. Such evidently is not the position of Mrs. Harrison or any of these complainants, and I am therefore utterly at a loss to perceive the principles of law or equity upon which the position of the court is based.

But the limitation or *qualification* contained in the propsition, is of itself fatal to the principle assumed. If the decree be conclusive against Mrs. Harrison as a complaianant in this suit, *so as to deprive her of the corpus of her estate;* to what greater extent, I would respectfully inquire, can it ever be made to affect her interest in this property? The qualification then, to my mind, is wholly nugatory for any practical purpose—it is "making the promise to the ear and breaking it to the hope."

Another position taken in the opinion of the majority is, that the conveyance of the property by Harrison to his daughter, Mrs. Sanderson, did not conflict with the main design of the marriage settlement, inasmuch as the children of the marriage were expressly provided for by the deed; and that such assignment was merely an anticipa-

tion of that design. The argument is more specious than sound—it will not bear the test of examination. The very act of *anticipation* is in direct conflict with the primary and controlling design of the settlement, viz: the preservation of a *life estate* to the wife and mother, in all the property embraced in the deed of settlement. This act of anticipation, if operative, effectually *destroyed* her life estate *pro tanto,* and was a manifest infraction of the proviso contained in the deed, which stipulates that any *alteration* of the trust should be made only by the *joint* act of the husband and wife, and with the assent of the trustees. But again, what evidence is there in the record tending to show the proportion which this property bears to the whole estate; and consequently how the other remaindermen will be affected by the abstraction of this portion of the property, when the time limited for a final division of the estate shall have arrived.

There are two questions in regard to Mrs. Harrison's possible interest in the property in controversy, which the court, in the opinion delivered, expressly reserve as open questions, and desire to be understood as not concluded by their decision, viz; First, "whether, if Robert Harrison by any casualty, should become unable to support his wife, she might not have a right to call upon Sanderson to contribute to the extent of his interest." And secondly, "her right (in the property) in the event of his (Harrison's) death, and she surviving him?"

The very expression of a *doubt* upon either of these points is an entire surrender of the whole argument in regard to the position assumed in the opinion, viz: that the trust in this property had become *executed* in Harrison by the de-

livery of the possession to him. The argument on that point, as I understand it, was this: that the trust contained in the deed of settlement for the joint use of Harrison and wife, became *executed* in Harrison *by the act of possession* —that the trust becoming executed, invested him with the *legal* title to the property; this being added to the equitable title which he before possessed, gave him the entire interest in the property, with all the incidents of *absolute* ownership; and being thus invested with an absolute estate, he had a perfect right to alienate the property, as he did.

This was the argument as I understand it, and it is the only argument upon which the position assumed by the court, with respect to the trust having been executed in Harrison, can be sustained. If I have misapprehended the views of the court upon this subject of *executed trusts*, then the whole argument falls to the ground and the position with it.

Now if it be true that Harrison thus acquired an *absolute* title to the property, with the consequent *right of alienation*, what question can arise as to the extent of Sanderson's interest in the property conveyed? If Harrison acquired an absolute estate by the execution of the trust, Sanderson also acquired an *absolute* estate by the execution of the conveyance to Starratt. The *doubts* expressed by the court would lead legimately to the inference, that they view Sanderson as standing in the relation of a *trustee* to this property, and as holding it coupled with the trusts of the original marriage settlement. Such a view of the matter, I again repeat, is a virtual surrender of the position assumed by the court, based upon the dectrine of "executed trusts." But be that as it may, the doubts themselves

are eminently *suggestive.* It may transpire in the order of Providence, that Robert Harrison may, "by some casualty, become unable to support his wife," and in the order of a like Providence it may occur that Sanderson, before the happening of such an event may have gone "to the bourne whence no traveller returns," and his estate been *distributed* so as to be beyond the beneficient arm of the Chancellor. What, under such circumstances, would be the situation of Mrs. Harrison? What her remedy? The answer embodied in the intimation of the court is, that she may *pursue* the property in whomsoever hands it might be found. But it may be beyond the reach of pursuit, and the effort wholy unavailing. Thus it will be seen that she whose comfortable support and maintenance was the special and primary design of a solemn deed of marriage settlement, made too at the interesting moment when, in the confidence of unsophisticated maidenhood, she was about to assume the responsible relation of wife, is to be referred, for the *security* of her covenanted rights, to the "casualties" of human life, and that too not by consulting the plain *meaning* of the written instrument, and the evident *intention* of the settlers, but by the rigid application of a doctrine of the law, which I hazard nothing in saying, has not the remotest application to the facts and circumstances of the case.

I now pass to that portion of the opinion which treats of the rights and interests of the *remainder men.* It is admitted by the court that if they have the interest in the property for which they contend, they are entitled to file a bill *quia timet,* for its protection. The bill, nevertheless, was dismissed without considering their interests. Whether

or not this was the correct practice, or whether the bill should have been retained *on their behalf,* and to the extent of that interest, is left somewhat in doubt by the authorities. It is doubtless the general rule, that where it appears on the face of the bill, that some of the plaintiffs have no interest in the suit, if the misjoinder be taken advantage of by *demurrer,* it will have the effect to dismiss the bill; but there are cases in which it is held that where the misjoinder consists not in the want of interest in some of the complainants, but only in their having been made plaintiffs instead of defendants, in such case the bill will be retained, and a decree made to the extent of the interest involved.

If, however, the dismissal of the bill, so far as the remaindermen are concerned, proceeded upon the assumption, that there was not sufficient in it to constitute it a bill *quia timet,* or upon the objection taken at the argument of the case, viz: that it was a *compound* bill of review, and *quia timet,* I am of opinion that either position is unmaintainable.

Without intending to indulge in a critical disquisition upon the necessary qualities of a bill *quia timet,* I apprehend that it will be found upon examination, that this bill contains all the allegations, charges and prayers, essential to constitute it a bill of that character. The objection that it is a compound bill will not hold good. In the case of Whiting vs. the Bank of the United States, (13 Peters S. C. R., 6,) the Supreme Court of the United States say: "The present bill seeks to revive the suit, by introducing the heirs of Whiting before the court, and so far it has the character of a bill of Revisor. It seeks also to

state a new fact, viz: the death of Whiting before the sale, and so far it is supplementary. It is therefore a *compound* bill of Review, of Supplement and of Revivor, and it is entirely maintainable as such, if it presents facts, which go to the merits of the original decree of foreclosure and sale."

Having thus disposed of the several positions contained in the opinion delivered on the part of the majority, I will now proceed very briefly to state my views in regard to the merits of the case.

By reference to the deed of settlement it will be seen, that it conveyed property, consisting principally of slaves, to trustees; the legal estate to be held by them upon divers trusts: first, for the use, benefit and behoof of the husband, until the solemnization of the intended marriage and after consummation of that event, to the use and behoof of the husband and wife, during the period of their natural lives, ("without any manner of waste, or impeachment of waste,") and with remainder over to the issue of the marriage.

Secondly. In case there should be no issue of the marriage, then the estate to go absolutely to the survivor. There is also in the deed, a special stipulation, "that the property conveyed, is not to be liable for the payment of any debt, judgment, execution, account, demand or otherwise of the husband," and that stipulation is coupled with a proviso, that the husband and wife, "with the approbation and assent of the trustees, may at any time, by writing or writings, under their respective hands, and attested by two or more creditable witnesses, revoke and make void, alter

and change all and every of, or any of the trusts, or estates, hereinbefore limited.

It is also proper to remark, that there are three distinct classes of property mentioned in the bill, to which the complainants set up title.

1st. The particular slaves named or referred to in the deed of settlement.

2nd. The *natural issue and increase* of those particular slaves; and

3d. Such slaves as are therein alleged to have been *purchased* by the husband out of the *profits and proceeds of the trust estate,* together with the natural issue and increase of the same.

With respect to the first class, it will be readily perceived from the general views which I have hereinbefore expressed in regard to the main position assumed by the Court, as the ground of their judgment, that I do not recognize any right in Harrison, the husband, to alienate any portion of the *corpus* of the estate. In arriving at this conclusion, however, I am not at all influenced by that argument of the counsel for the complainants, wherein he invoked the *analogy* of the law relating to the *real* estate held in joint tenancy by husband and wife. In such case, the estate is even more than an ordinary joint-tenancy—it is an estate held by *entireties,* and the husband may not alienate even a moiety, or any portion thereof, without the concurrence of the wife. 2 Black. Com., 182.

There may exist a joint tenancy in things *personal* and when so held, the estate is subject to all the rules governing *real* property. (2 Black. Com. 399.) But this must be taken to be so, only as between *strangers,* for a joint

tenancy in the *legal* estate, cannot exist between the husband and wife, and for this very simple reason, based upon a canon of the common law, that the husband *jure mariti* is entitled to all the personal estate of the wife, to which she has the *legal* title, and which may have come to his possession in his life time; and if he is entitled to that which comes to her in her *individual* right, *a fortiori* he is entitled to that which is conveyed to them *jointly*. It is laid down in Roll's Abridgment, 343, that "when the husband is *jointly* possessed of a leasehold interest, or other *personal* thing, he may dispose of it in his life time, without the consent or concurrence of his wife.

And again, at page 349, that "if goods are given to the husband and wife, the wife shall not have them by survivorship, but the executor of the husband." Vide 3. Bac. Abr., (Bird Wilson's Ed.,) 647.

It will thus be perceived, that no argument can be based upon any *analogy* supposed to exist between the two kinds of property. I desire to place the rights of the wife upon safer and higher grounds, viz: that of an *express trust*.—Under the provisions of the settlement, the husband was entitled only to the *joint use*, with his wife, in the property conveyed, and that too to be enjoyed only during the term of his natural life. The legal estate was not in either of them,—it resided in the trustee.

With respect to the second class of property specified in the bill, viz: *the natural issue and increase* of the females slaves, I can perceive no sound principle of law, upon which they can be made to take a direction different from that given to the first class. If we resort to adjudications upon this subject, it will be found that in the Southern States of

the confederacy, where negro slavery is a cherished domestic institution, there exists an unbroken current of decisions, which has settled the principle that *partus sequiter ventrem*. It is the doctrine of humanity.

But I have a surer guide to my conclusion, in the intention of the parties who executed that settlement. The object and design evidently was, while careful to secure to the wife a comfortable maintainance for herself and family during the term of her natural life, to make a competent and substantial provision for the issue of the marriage. If I am correct in this interpretation of the intention of the parties to the deed, then it is very evident that the object contemplated, could be secured only by causing the issue of the female slaves to follow the condition of the mothers.

If, as was insisted in argument, the trusts are to be restricted exclusively to the slaves mentioned in the deed, it is very evident that in view of the casualties of human life, and the certain and irresistable encroachments of age, the provision for maintenance and support would stand upon a very narrow and unstable basis, and the exception of the issue of the marriage as remainder-men, would be doomed to certain disappointment.

But we need not resort to implication, in order to ascertain the intention of the parties—the deed itself speaks a language which is not to be misunderstood. In the conveyance to the trustees, it expressly and in terms conveys "the issue and increase of the females." I presume that this particular language of the deed escaped the observation of the very vigilent and astute counsel who argued the case for the appellant, or he would not have sought, as

he did, to distinguish between the two classes of property.

With respect to the *third* class, viz: that portion of the slaves including their natural increase, which is represented in the bill, as having been *purchased* by Harrison, with the "profits and proceeds" of the trust estate, I have felt greater difficulty in arriving at a satisfactory conclusion. It is undoubtedly correct as a general principle, that where trust money or the *proceeds* of a trust estate, is invested in the purchase of property, or in any other manner, the particular investment, of the property so purchased, will be deemed in equity to enure to the benefit of the original trust. This however is but the enunciation of a *general principle,* and like all general principles, when it does not contravene the policy of the law, must yield to the clearly ascertained intention of the parties, whether that intention be manifested by the express stipulations of the deed, or can be reasonably *implied* from the object and design of the settlement. To my mind, whether we resort to the one course or the other as an index to the intention of the parties, it is very apparent that it was never the design of the settlement, to restrict or limit the power and control of the husband, with "respect to the proceeds and profits" of the trust property, any further than might be necessary to effect the *primary* object of the trust, viz: to secure to the wife a comfortable and adequate support and maintenance for herself and family, during the term of her natural life. So long as the *corpus* of the estate was kept intact, I think that the husband had a right to appropriate and dispose of the surplus of the proceeds and profits, as he might deem best, and according to his own will and

pleasure. And I am strengthened in this conclusion, from the fact that there is no provision in the deed looking to any *accumulation* of the estate, other than that intimated in the stipulation, with respect to the "issue and increase of the female slaves."

There is moreover to be found in the deed of settlement a very particular and unusual clause, which would seem to favor the view which I have taken of this branch of the case. I allude to the clause which expressly stipulates that the *joint use* of the estate is to be enjoyed by the husband and wife, during the term of their natural lives, *"without any manner of waste or impeachment of waste, to be held, done, made or committed."* This stipulation, in the connection in which it is found, is manifestly inapplicable, and if subjected to a rigid construction, would become wholly nugatory. But being inserted in the deed, it was evidently intended to convey some meaning, and it is our duty, looking to the intention of the parties, to give it such an interpretation as may render it most consistent with the context.

"Waste and impeachment of waste" are technical terms, and are found only in conveyances of *real estate*,—they are entirely inapplicable to *personalty*. "Waste or *vartum*." "*It* (says Blackstone) is a spoil or destruction of houses, gardens, trees or other corporeal heriditaments, to the disherison of him that has the remainder or revision in fee-simple or fee-tail." (2 Black. Com. 281.)

Impeachment of waste signifies a restraint from committing waste upon lands or tenements, or a demand or compensation for waste done by a tenant, who has but a particular estate in the lands granted, and therefore no

right to commit waste. All tenants for life or any less estate are liable to be impeached for waste, *unless they hold without impeachment of waste;* in the latter case they may commit waste without being questioned, or any demand for compensation for the waste done." 2 Coke, 82. 1 Bouv. L. D. 484.

Proceeding to give an interpretation to this clause of the deed, so as to save it from being rendered wholly nugatory, and to make it consistent with the context, I am clearly of opinion that it is susceptible of but one meaning, viz; that the tenants of the particular estate should be permitted to enjoy the *joint use* of the same, *"without account,"* either as between themselves or as between them and the remainder-men. If I am correct in this construction, then it results as a necessary consequence, that Harrison, the husband and one of the tenants of the particular estate, had the right to appropriate to himself such portion of the "proceeds and profits" of the trust property as might remain after providing out of it an adequate support for the wife and family. If he appropriated this surplus to the purchase of property for himself, as I think he might well have done, then he had an unquestionable right to alienate it, and the conveyance to Starratt, in trust for his daughter, the late Mrs. Sanderson, ought to be sustained *to that extent* as good and valid.

If the *demurrer* had been restricted to this portion of the bill, I should have concurred with the majority of the Court in sustaining it; but being general to the entire bill, I am constrained from the views which I entertain in regard to the whole case, to *dissent* from the judgment of the court upon the well recognized principle of equity practice, that

"a demurrer bad in part is bad in whole, and must be overruled."

I should have been gratified to have had the opportunity to give my views in regard to the very many interesting questions, so ably argued by counsel on either side, but the length of this opinion admonishes me of the propriety of now bringing it to a close.

If I have exceeded the limits usually assigned to a dissenting opinion, I claim an apology in the paramount importance of the question involved, and in the firm conviction (with all deference for the views of my respected associates) that the doctrines announced in the opinion of the Court are not only unsustained by authority, but are in direct conflict with the best interests of society, and take away the only shield which an affectionate and provident parent is allowed to interpose for the protection of his confiding and often unfortunate daughter, and her innocent and helpless progeny.

DOE ON THE DEMISE OF MARIA DAGGETT, APPELLANT, VS. CHAS. WILLEY, APPELLEE.

1. In a case of contested boundary, course and distance yield to natural objects, and distance to be extended or shortened to conform to them.

Daggett vs. Willey.—Statement of Case.

2. Where parties having an interest in a common boundary, as owners of grants adjoining, agree to a dividing line, and especially where a town is laid out by Commissioners predicated on such agreement, and the property is held thereunder for a great number of years, this is conclusive as against them and those holding under them, and parol testimony is good and admissible to prove such agreement.

3. It is not proper for the court to charge the jury that circumstantial evidence tending to show a probability that a survey covered the land in dispute, is sufficient to found their verdict.

4. Reputation and hearsay, of themselves, are not evidence; yet, in connection with other evidence, they may be entitled to respect in cases of boundary after great length of time, and when it may be impossible to prove the existence of the primitive land marks.

5. The court cannot assume the conclusiveness of the testimony of any witness, and it is error so to charge.

6. The court will not regard an assignment of error not connected with or necessary to the merits of the case.

7. Whilst the ruling of the court may be erroneous in some respects, the court will not reverse the judgment if the verdict is sustained by the evidence.

Appeal from the Circuit Court for Duval county.

This is an action of ejectment for the recovery of a lot of ground in the city of Jacksonville, known on the map of said city as lot No. 5.

The plaintiff offered in evidence to sustain the issue on her part, a deed executed by I. D. Hart, in December, 1836, to William J. Mills, in trust for Maria Doggett, the lessor of the plaintiff, who was then a *feme covert,* but now a widow and *feme sole,* conveyed a "certain tract of land situated in Jacksonville, Duval county, Florida, and bounded as follows: on the south by St. Johns river, on

the north and east by Hogan's Creek, and on the west by lands granted to the heirs of Purnal Taylor, and now owned by I. D. Hart, which described as above, was formally granted by the Spanish Government to Juan Maestre, and by Hart purchased from John Bellamy, &c., including fifty acres," &c.

The plaintiff also offered in evidence the petition of John Masters to the Governor of Florida, dated 18th November, 1816, representing the straightened circumstances of the petitioner, and praying for a "grant of one hundred acres of vacant hammock land on the north side of the St. Johns river, opposite the battery of St. Nicholas and bounded by Mr. Daniel Hogan's plantation in the neighborhood of a creek." Attached to which petition is a decree of the Governor dated 2d December, 1816, directing that there be "granted to the petitioner the one hundred acres of land at the place mentioned, without injury to any third party, and a certified copy thereof as evidence be issued to him from the Secretary's office." To which is also appended a note, as follows: "By a decree rendered at the instance of the petitioner of the 2d of last month, there were granted to him fifty acres of land at the south point of St. Johns Bar, distant about one mile from Quesadas Battery, which grant has been made to him in consequence of his having proved that up to the present time he had located but fifty acres out of the one hundred granted him."

The plaintiff also offered the survey and plat made in obedience to the decree aforesaid, which survey is as follows:

"I, Don George Clark, Lieut. of Militia of St. Augus-

tine of Florida and Surveyor General appointed by the Government of the said place and province, do certify that I have measured and bounded for Don Juan Maesters fifty acres of land on the north side of St. Johns River, at a place called Cowford, or ferry of the King's road, being a part of one hundred acres granted to him by the Government on the 13th of December, one thousand eight hundred and sixteen, which survey agrees with the following plan and its original which is recorded in the book of surveys of land under my charge. Fernandina, 21st of February 1817."

On the plat of this grant, outside of the west boundary, are the words "Maria Taylor's land;" on the north is Hogan's creek, and on the south the St. Johns River. The first line runs from the confluence of Hogan's Creek and St. Johns River, west, thirty chains, to the second line, which begins on the St. Johns River and runs north thirty-three and a half chains to a pine.

Plaintiff also read in evidence the grant and survey of a tract of two hundred acres of land granted by the Spanish Government, on the 13th day of September, 1816, to Maria Taylor, commencing on the north side of St. Johns River, at the mouth of McCoy's Creek, running thence north 40 chains to a pine, thence east fifty chains to a pine, thence south 40 chains to an oak on the St. Johns river. On the plat of the survey of the Maria Taylor grant, outside of the east boundary, are the words "Juan Maesters' Land."

Plaintiff then offered Thomas Suarez as a witness, who testified that he is acquainted with the Maria Taylor and John Masters' grants. Hogan's Crek adjoins the town to

the east and M'Coy's Creek is the first Creek above and to the west. Was one of the chain carries when the surveys were made. The surveys were made by a Mr. Miller —not farther back than 1817—who it was said acted as deputy under George I. F. Clark. We started on the Taylor grant, commencing at the mouth of M'Coy's Creek at a "gum tree;" has seen the tree since, but it is not now standing. There is an old Spanish line there now, but when we run it there was none. We run a line from the Creek out; thinks the first line was north. The next line went down towards Hogan's Creek, and the third line ran back to the river. We marked a corner, thinks it was an oak in the hammock—there were no pines there. The trees stood as close to the river in the hammock as we could get—has seen the oak since, but it has been a great many years ago. Can't state now where the south-east corner of the Taylor grant was, as the town now covers it, but it was above where the Master's line came. These two lines did not come together. The corner of the Taylor tract was some distance above Market-street. The Taylor grant was run out first. On the same day we commenced at the mouth of Hogan's Creek and ran the Masters grant. We chained along the bluff up the river, can't say now many chains we run, but when he got his complement he made a corner. It was not up to the Maria Taylor grant. There was no other line marked on the ground. In running the west line of the Taylor grant we made surveyors marks on the trees—a blaze and two chops. Has traced this line lately and found Spanish marks. There is another line, one made by the United States, *a little this side;* thinks this is the line on which there are some old marks. They

are not far apart, about fifty yards. Witness has seen trees blazed on the first line going out. Knows the premises, on the corner of Market and Bay streets, in dispute—does not think they are within the lines of the Taylor grant as surveyed by us—thinks they lie east of the Taylor grant. Witness does not know of his own knowledge that Miller had any authority from Clark, the Spanish Surveyor-General, nor was he present when Clark surveyed these grants . There are now three or four gum stumps at the mouth of McCoy's Creek.

John M. Irwin, another witness for plaintiff, testifies that he is a surveyor, that he has recently run the Taylor grant. That he commenced at a gum stump, and run according to the first line of the plat, north forty chains on an old line, and made a corner, thence east fifty chains and made a corner in a marsh, thence south to the river and found *plain marks on the west line—an old well marked line*—found none on the north line. He commenced at a stump—no one pointed it out—he found it. They commenced at a stump northwest of the well defined line, two chains twenty-three links pointed out to them. After running with the compass and searching for an old line they abandoned that. There were some indications of a new line, but no old one. In running the well defined line they crossed two cypress ponds. The last pond very close to the termination of the forty chains. From a corner at the end of the forty chains they ran fifty chains to the east, thence south to the river, and came out on the river at the east boundary of Ocean street. Witness was on the ground at the starting point with Mr. Suarez, and while he was taking observations, Suarez said "that must be the stump." There was no

other old Spanish line in that vicinity, that witness could find. There was no marks on the north line.

The mouth of McCoy Creek is east of the stump, from which he started to run these lines. He did not measure the distance, but supposes it to be two hundred feet or a little better. The first stump from which he started is nearer the mouth of the creek than the other. The marks on the west line are upwards of thirty years old.

A. Williams, another witness for plaintiff testified that he is a surveyor, and has been accustomed to survey grants. Spanish lines, well identified, are very rare. He ascertains the time a blaze has been made by the appearance of the wood grown over it. He has recently surveyed the Taylor Grant—he followed the lines as surveyed by Mr. Irwin. The first line runs upon an old line, well defined on the west line of the claim—they are very old marks. The west line runs due north, which is very unusual for Spanish lines . The old line started from a gum. It extends north seventy-two chains being, witness supposes, the west boundary of Hogan's grant. He started from a gum stump, pointed out to him, not exceeding five chains from the St. Johns river—part of the blazes were grown over—should think them over twenty-five years old. He found no trees on the north line, and found no northeast corner tree—found no marks on the line running south. The majority of the marks on the west of the Taylor grant were a blaze and two chops.

Oliver Wood, another witness for plaintiff, testified that he is a practical surveyor, that he has run the lines of the Taylor grant. Commenced at a gum stump north side of McCoy's Creek. Thomas Suarez showed him the stump.

About a year ago he ran the west line north forty chains. He found trees marked. They were old marks, but there were some new ones. At about forty-two chains there was a stake marked with a cross. At the side of the road near by was a small pine—neither could have been very old. He ran the next line east fifty chains—found no corner there. He ran the east line parallel with the first—it terminated about a half chain from the east line of Captain Ledwith's water lot. Has surveyed some of the lots in town. The distance from Market-street to Ocean-street is about seven hundred feet.

Francis J. Pons, another witness for plaintiff, testified that he was one of Mr. Irwin's chainmen—that they ran the first line north forty chains, the second one east fifty chains and the third one south about forty-eight chains. The lines were measured correctly.

Thomas Henderson testified that he is acquainted with the locality at the mouth of McCoy Creek. The point beyond and above the mouth of the creek has made out further than it did fifteen years ago.

George C. Acosta, another witness for plaintiff, testified that the point at the mouth of McCoy's Creek has filled out one hundred feet within the last five years.

The plaintiff then read in evidence a deed from John Masters to John Brady, dated 21st day of June, 1820, conveying to said Brady the land granted to the former by the Spanish Government; also a deed from John Brady to John Bellamy, dated 27th January, 1823, for the same land; also a deed from John Bellamy to I. D. Hart, dated 4th day of May, 1836, for the same land.

The defendant to sustain the issue on his part read in

evidence a deed from I. D. Hart to Hammond Libby, dated 25th of July, 1855, conveying the west half of lot No. 5; also a deed from Hammond Libby to the defendant, dated 21st May, 1836, conveying the same half of lot No. 5.

The defendant also read in evidence the record of a deed from I. D. Hart to the defendant for the other, or the east half of lot No. 5.

Defendant then offered in evidence a deed from Lewis T. Hogans and Maria his wife (who signs as Mary Hogans) formerly Maria Taylor, and others the heirs of Purnal Taylor, to I. D. Hart dated 28 May, 1834, for part of the tract of land granted by the Spanish Government to the widow and heirs of Purnal Taylor. The introduction of this deed was objected to by plaintiff's counsel on the ground that Mary Taylor was not Maria Taylor, and that said deed was not acknowledged by the said Maria or Mary Taylor according to law; whereupon Thomas Suarez was called by defendant who testified that he subscribed said deed as a witness thereto, that Maria Taylor was his sister and could not write—does not know who signed it for her. Witness was called to sign the deed and his sister acknowledged the deed. The deed was then admitted by the court to be read to the jury on the question of boundary. To which plaintiff excepted. Defendant also offered in evidence another deed from said Hogans, and Maria his wife, formerly Maria Taylor, and the heirs of Purnal Taylor to I. D. Hart dated 15th of April, 1836, for other part of the land granted by the Spanish Government to the widow and heirs of Purnal Taylor. To the introduction of which, plaintiff objected on the ground that it was not acknowledged by said Maria Hogans separately and apart

from her husband. This objection being overruled said deed was admitted to be read on the question of boundary, to which plaintiff excepted.

Defendant also offered in evidence a deed from said Hogans and wife to I. D. Hart dated July 10th 1831, conveying another part of the tract of land, so as aforesaid granted by the Spanish Government. The introduction of which was objected to on the ground of irrelevancy, but the court overruled the objection and admitted the said deed to be read on the question of boundary. To which plaintiff excepted.

F. J. Ross a witness for defendant testified that he was one of the Commissioners for laying out the town of Jacksonville about the year 1824. John Bellamy and Benj. Chairs were the other Commissioners. John Brady who claimed to own one part of the town site, and Hart who claimed the other part, were both present. Brady purchased from John Masters and Hart from Hogans. So they stated at the time. Market street was assented to and agreed upon by both Brady and Hart as the boundary line between the lands owned by Hart on the west, and Brady on the east. A tree was standing on the bank of the river at the foot of market street which was claimed by Hogans from whom Hart bought, to be a corner tree as marking the point where the survey between the two tracts commenced. The tree had marks upon it but witness cannot swear that it actually was the original corner tree. Brady at first deemed it to be such original tree and there was some considerable dispute between them (Hart and Brady,) on the day the town was laid out, but it was at last agreed between them that the tree above mentioned should be ta-

ken as the starting point and the commissioners should lay off that street as the dividing line between them. Before the Commissioners would proceed to lay off the town, the question was asked by the witness of both Hart and Brady if they had agreed to the street marked as market street, but which witness thinks was not at that time called market street, as the boundary line, and they distinctly stated they were so agreed. He states further that he purchased lots one and four in square two, west of Market street, on the same day the town was laid off, which he sold back to Hart. He may have also purchased lot No. five also west of Market street and bounded on the east thereby. He also purchased a lot from Brady. At the time the town was laid off, Hart was living in the house on or very near to what is marked on the plat as lot No. five, in square two. That in about a year Brady sold his interest to John Bellamy, who was one of the Commissioners for laying off the town, and that neither Bellamy nor Brady ever made any claim to any thing west of Market street, but on the contrary acquiesced in Market street as the boundary line. Witness never heard of there being any other line claimed until about a year ago or perhaps a little longer.

James McCormick, another witness for defendant, testified that he was present when the town of Jacksonville was laid out or a part of it. This was in 1822, he thinks. The commissioners were Major Chaires, Fancis J. Ross, John Bellamy, Stephens J. Eubanks, and perhaps others. Thinks John W. Roberts acted as clerk of the commissioners.—Thinks they had a surveyor—he was D. S. H. Miller.—Mr. Brady claimed on one side of Market street, and Col.

Hart on the other. They were both present. They commenced at the foot of Market-street. Hart and Brady each agreed to give one-half of the street. Miller said that was the corner. At the time the town was laid off, Col. Hart lived near what is now Mr. Frazer's office. Mr. Brady was living in the middle part of what is now Mr. Doggett's house, on the east side of Market street.

Plaintiff's counsel objected to the admission of the testimony of Mr. McCormick on the grounds, first: that it was irrelevant to the question at issue, and calculated to mislead the jury; second: that it was an attempt to prove title to real estate by parol testimony; and third, it was an effort to vary by parol testimony the boundary of the grant from the description given in the deed. These objections being overruled, the plaintiff excepted.

Defendant offered in evidence sundry deeds executed by I. D. Hart to divers persons, bearing date previous to the date of the deed from Hart to Mills in trust for Mrs. Doggett, covering lots embraced within the disputed boundary. The introduction of which was objected to by plaintiff for irrelevancy, which being overruled, the plaintiff excepted.

Plaintiff, by way of rebutting testimony, then offered in evidence a bond dated 23d December, 1840, from I. D. Hart to H. Ashlock, for titles to a piece of land on the western border of the Taylor grant, showing his ownership and occupancy of the same. To the introduction of which defendant objected, and the objection being sustained, plaintiff excepted.

The court instructed the jury as follows:

"The present action of ejectment is brought for the recovery of a certain piece of land, known and distinguished

ken as the starting point and ... of Jackson-
lay off that street as the ... by the plain-
Before the Commissioners ... only in defence,
town, the question was as... tion of the case
and Brady if they had ... wn a regular deed
market street, but which ... in trust for her, and
called market street, as ... es within the boun-
stated they were so ag... st for her.
chased lots one and ... in the limits embraced
street, on the same ... perfect title, and entitle
back to Hart. H... endant has shown some
also west of Mar... nclusion of the court
by. He also pur... standing either in the de-
town was laid ... ner person. A plaintiff in
near to what ... strength of his own title,
square two. ... defendant's. It is all im-
to John B... be carried away by the
laying off ... for the parties, but take
ever made ... and upon it, render a
but ... ted to you is, whether
boun... in the boundaries of the
offi... W. J. Mills, in trust for
lo... certain tract of land
... County, Territory of Florida,
... south by St. Johns river,
... 's Creek, and on the west
... of Purnal Taylor and now
... which described as above was
... Spanish government to John Mas-
... of John Bellamy, includ-
... the boundary aforesaid, and all of

more or less, except such parts as was sold
els of the same as were legally deeded away
to the tenor of a deed made by John Brady to
Bellamy, and according to the tenor of a deed made
by John B. to me for the above bargained premises, &c., in
full confirmation of said deeds."

"The plaintiff shows the grant to said Masters and a survey thereof and the grant to Maria Taylor and a plat, which she claims to be a survey thereof, for the purpose of defining thereby the boundaries of said grants, claiming that the same established that the "Masters grant," bounded on the Taylor Grant, "and that the premises in dispute are embraced within the calls of the survey of the Masters grant." The return of a survey made into the Surveyor-General's office or any other office or place to which it should be returned, and a lapse of twenty-one years afterwards, without any attempt being made during that interim to contravene or take exception to it, is conclusive evidence that it was regularly made.

"If from the evidence you find these surveys were returned by said George I. F. Clark into the Surveyor-General's office or archives of the Spanish Government in Florida, where they are found, and twenty-one years have elapsed without any attempt, during that time, to contravene or take exception to them, the law presumes they were regularly made.

"After so great a length of time has run around since the survey of these grants, circumstantial evidence tending to show the probability that the survey of either grant covered the land in dispute, is sufficient.

"Although some portion of the evidence respecting the

boundaries of these two grants is mere reputation or hearsay, yet such evidence taken in connection with other evidence, is entitled to respect in cases of boundary, where the lapse of time is so great as to render it difficult if not impossible to prove the boundaries by the existence of the primitive landmarks or other evidence than that of hearsay.

"The highest regard is had to natural boundaries, and to lines actually run, and corners actually marked at the time of the survey or grant, and if the lines and corners of an adjoining tract are called for, the lines will be extended to them if they are sufficiently established, without regard to the quantity included, whether the same be more or less than the quantity expressed. The defendant has shown a regular deed from Isaiah D. Hart to him of said east half of said lot No. 5, dated subsequent to the deed under which the plaintiff claims, which he claims is not included in the said deed under which said plaintiff claims. In other words, that the same was not conveyed by said Hart to said Mills, in trust for said plaintiff.

"This as we have before stated, presents the great question, whether the land in dispute was included in the boundaries of the said conveyance from said Hart to said Mills, in trust for said plaintiff. Parol declarations and confessions of persons who, at the time, are owners or claimants in posession of land, as to the true boundary line between them, and assented to by them, are admissible evidence in suits between those who claim under them, or either of them, under subsequent title. Therefore, if you find from the evidence that said Brady and said Hart, while they or either of them were owners or claimants in pos-

session of the lands in dispute, made parol declarations and confessions as to the true boundary line, then such declarations and confessions are admissible as evidence in this cause against such owner or claimant in possession, and entitled to be considered by you as conclusive.

"If, however, you find from the evidence that said declarations and confessions were obtained by fraud or concealment, and they were not made with a true and full knowledge of the facts, then they are not entitled to such credit.

"You are the sole judges of the facts, and it is not only your right but your duty to find according to your views of the proofs.

"This action is to recover possession of the premises in dispute, and not to recover damages, but form requires you should find some nominal sum. Therefore, if you find for the plaintiff, you will say the defendant is guilty in manner and form as the plaintiff against him has complained, and you do assess the plaintiff damages by occasion thereof.

"If you find for the defendant, then you will say, the defendant is not guilty of the trespass and ejectment in the declaration alleged."

To all which charging plaintiff's counsel, then and there excepted, and assign the same as cause of error.

The plaintiff's counsel then asked the court to give the following charges to the jury, to-wit:

"That if the admissions and confessions of the parties were made with ignorance of their rights under the law, then such admissions or confessions will not be binding upon the party making them or upon persons claiming

under him or them. Which was given accordingly.

The defendant's counsel then asked the court to charge the jury as follows:

"1. That the plaintiff's claim in this case depends on the plat of survey of the lands made by Clark, the Surveyor-General—so far as the boundary is concerned.

"II. That the survey of Miller, made in 1817, as testified by Suarez and the lines marked by him, are not conclusive or binding upon either the plaintiff or defendant."

"III. That the royal title to Maria Taylor of September 18th, 1816, vested in her an absolute title to two hundred acres of land fronting on the river and between M'Coys' Creek and the point opposite St. Nicholas, even before the survey made by Clark in 1817."

IV. That the deed of Hart to Mills in trust for Mrs. Doggett, of the Masters grant, referring as it does to the deeds from Masters to Brady, and from Brady to Bellamy, and Bellamy to Hart, conveys only the lands, which were conveyed by these successive deeds and that therefore anything which would defeat the title of Brady, (such as thirty years acquiescence in a line,) is a good defence in an action by Mrs. Doggett.

V. That when a deed is made of a tract of land, which is described by its name and not by natural land marks, it is competent for a jury to enquire what lands were intended by the name used, and that if they are satisfied from the evidence, that both the grantor and grantee understood a particular tract, the grantee takes that tract and no more.

VI. That when the boundary line between two contiguous estate has become doubtful, and the owner of one

of said estates afterwards acquires the title to the other, but resells the same by name and without defining the true boundary, both granter and grantee are estopped to enquire what was the original boundary, but must abide by the line claimed by the grantor prior to his acquisition and during the time he held both titles.

VII. That a disputed question of boundary, is forever, put at rest by the vesting of both estates in the same person, and that all persons claiming under him, are absolutely estopped from asserting the boundaries to be other than he had uniformly declared it to be.

VIII. That the owner of two contiguous estates, has an absolute right to alter and change the dividing line between them, and if he afterwards sells either of them by name and not by mets and bounds, his grantee (if cognizant of the alteration,) takes the estate with the new boundary, and is not remitted to the old.

"IX. That when two estates are vested in the same owner and he sells one of them by name and not by metes and bounds it is not competent for his grantee to assert a claim to other lands than those generally known at the date of the conveyance by the name used therein, nor can he recover in ejectment by simply proving that before his immediate grantee acquired title, the lands in controversy were embraced in the estate by the name used in the conveyance to him.

"X. That although the quantity of land yields to course, distance and natural objects, yet the quantity may and ought to be considered as a description by the jury when the exact boundaries are difficult to ascertain."

Which instructions so asked by defendant were granted

by the court, and to all which plaintiff excepted.

The jury having rendered a verdict for defendant, plaintiff appealed.

Felix Livingston and Philip Fraser for Appellant.

Geo. W. Call, Jr., for Appellee.

BALTZELL, C. J., delivered the opinion of the court.

This is an action of ejectment instituted by plaintiff, Mrs. Doggett, to recover a lot of ground lying in the city of Jacksonville. The case was tried by a jury who found a verdict for defendant under instructions given by the Circuit Court. These being excepted to at the trial, together with the ruling of the court in the exclusion and admission of testimony also excepted to, constitute the questions for the determination of this court. They have been argued with ability on both sides, showing a degree of preparation and industry in the management of the case not often surpassed.

We have given to it a very careful consideration, due alike to its importance not only in the individual case, which does not involve property of very large amount, but in numerous other cases depending upon its determination; and we now proceed to announce the result of our deliberations. At the instance of defendant the court admitted deeds from Lewis Hogan and wife (who was Maria Taylor, the grantee in a concession by the Spanish Government, more particularly alluded to hereafter,) and the heirs of Purnal Taylor to Isaiah D. Hart, which was objected to by plaintiff on the ground that Mrs. Hogans was not examined, and did not acknowledge the deeds apart from her husband. That they were insufficient to convey her right is admitted. The question arises, may not the deeds be

available as evidence in the case notwithstanding this objection, and we think they may. They are obviously good for the interest of the husband during his life time and for that of the heirs after death. The former was tenant by the courtesy and to that extent his interest was conveyed. This at all events gave color of right to defendant claiming under Hart, and is sufficient for the purpose of this action.

The fourth error assigned is to the receipt of certified copies of the proceedings of the Board of Land Commissioners in St. Augustine. If there were any such before the court on the trial of the case, they are not to be found in the copy of the record before us. The fifth and sixth errors relate to the admission of the deposition of Francis J. Ross and the evidence of John McCormick, and constitute the leading points in the case. To determine them properly it is necessary to have a clear conception of the state of the case as presented by the evidence at this stage of it.

The plaintiff adduced in evidence a deed from Isaiah D. Hart to Mills in trust for himself, dated December 18th 1836, she being at the time a *feme covert,* though now a widow and a *feme sole,* conveying a tract of land known as the Masters grant. This latter was founded upon an application to the Governor of Florida, dated 18th November, 1816, representing the straightened circumstances of the petitioner, and praying for a grant of one hundred acres of land of vacant hammock on the north side of St. Johns river, opposite the battery of St. Nicholas, and bounded by Mr. Daniel Hogan's plantation in the neighborhood of a creek.

A note attached to the order of the Governor acceding to the petition, is to this effect: "By a decree rendered at the instance of the petitioner of the 2d of last month, there was granted to him fifty acres of land at the south point of St. Johns bar, distant about one mile from Quesada's battery, which grant has been made to him in consequence of his having proved that up to the present time he had located but fifty acres of the hundred granted him."

The survey made in obedience to the decree is in these terms:

"I, Don George Clark, lieut. of the militia of St. Augustine, of Florida, and Surveyor-General, appointed by the Government of the said place and province, do certify that I have measured and bounded for Don Juan Masters fifty acres of land on the north side of the St. Johns river, at a place called Cowford, or Ferry of the King's road, being a part of one hundred acres granted to him by the Government on the 13th December, 1816, which survey agrees with the following plan and its original, which is recorded in the book of surveys of land under my charge." Fernandina, 21st February, 1817. Signed George I. F. Clark. [The plat of survey describes the first line as running from the confluence of Hogan's creek and St. Johns river west thirty chains to the second line, which beginning on the St. Johns river at an oak, runs north 33 1-3 chains to a pine. Outside of the second line or west boundary of this grant are the words "Maria Taylor's land."]

Plaintiff claims that her western line connected with a grant made to another party, by virtue of a clause in the deed made to her by Hart, in these words: "All the right and interest of said Hart to a tract of land

bounded on the south by St. Johns river, on the north and east by Hogan's creek, and on the west by the lands granted to the heirs of Purnal Taylor, which described as above was formerly granted by the Spanish Government to Juan Maestre, and by Hart purchased by John Bellamy, &c., including fifty acres, &c."—The plaintiff adduced and read in evidence to the jury a grant to Maria Taylor, the widow of Purnal Taylor for 200 acres "commencing on the north side of St. Johns river, at the mouth of McCoy's creek, running thence 40 chains north to a pine, thence 50 chains east to a pine, thence 40 chains south to an oak on the St. Johns river."

She then introduced evidence of surveyors and others to show that the beginning of this latter tract on its western side was at a stump near McCoy's creek, and that blazes and chops were found on a line running north from it. No corner was found here, and the line was made to terminate agreeably to the distance; the remainder of the line was run agreeably to course and distance, no corner nor blazes or chops having been found on the last and eastern line.—Surveyed in this manner, this grant on its eastern side next to the Masters grant, terminated some two or three squares or blocks west of the lot in contest which lies on and directly west of Market street.

The position of the plaintiff obviously then is that the eastern line of the Taylor grant terminates at a point west of Market street, thereby throwing the lot in contest within the Maestre grant owned by her, and this she hopes to do by establishing a line as we have described, claimed as the true line by its chops and blazes on the west, and the remainder according to course and distance. Under such a

state of the case it is very clear that defendant had the right to adduce evidence showing that this line did not commence or terminate as contended for, that on the contrary the actual survey terminated at a corner as its boundary and embraced Market street and of course the lot in question.

This he proposes to do by the deposition of Francis J. Ross and the testimony of John McCormick. Ross proves "that he was a commissioner for laying out the town of Jacksonville about the year 1824, that Brady claiming a part of the town site, and Hart another part, were present—that there was a tree standing on the bank of the river *at the foot of Market street,* which was claimed by Hogans from whom Hart had bought, to be a *corner tree—the tree had marks upon it,* but witness cannot swear that it actually was the corner tree. Brady first deemed it to be such original tree and there was considerable dispute between them."

McCormick says, "he was present when the town of Jacksonville was laid out or a part of it, this was in 1822—he thinks the Commissioners were Major Chaires, Francis J. Ross, John Bellamy, Stephen J. Eubanks and perhaps others—thinks John W. Roberts acted as clerk of the commissioners—thinks they had a surveyor, he was D. S. H. Miller—he said the corner was at the foot of Market street."

Here then we have on the eastern line a tree with marks upon it claimed by Hogan the former owner of the Maria Taylor grant to be a corner tree, insisted upon by the then owner Hart and in a degree admitted by Brady the owner of the Maestre grant—a tree existing in 1822 or 1824, when

the town was laid out by the commissioners, only five or seven years after the survey. In addition to this we have the fact that D. S. H. Miller a surveyor in the employ of the commissioners said "that was the corner"—the same person (if we are not mistaken though the proof is not entirely distinct) who made the original survey and whose declaration under the circumstances would be entitled to weight.

Now, that this is material it is sufficient to state that the establishment of a corner tree at Market street fixes the eastern line of the Maria Taylor grant so as to embrace the lot in contest within its limits, and excludes it from the Maestre grant. Taking it that plaintiff has succeeded in fixing the western line of the same grant by a corner tree and blazes and chops, this testimony if believed by the jury may be regarded as settling the eastern line at the foot of Market street and upon grounds supported by undeniable principles long since established in cases of disputed boundary.

"It is a general principle that the course and distance must yield to natural objects called for in the patent. All lands are supposed to be actually surveyed, and the intention of the grant is to convey the land according to that actual survey; consequently if marked trees and marked corners be found conformably to the calls of the patent, or mountains, or any other natural objects, distances must be lengthened or shortened and courses carried so as to conform to those objects. The reason of the rule is, that it is the intention of the grant to convey the land actually surveyed, and mistakes in course or distance are more proba-

ble and frequent than in marked trees, mountains, rivers, or the natural objects capable of being clearly distinguished and accurately described." McIver's Lessee vs. Walker, 9 Cranch, 173. 3 Cond. S. C. R., 338. 6 Wh. 58. 2 Hillard, Real Prop., 254.

Nor is this all that Ross and McCormick prove. Ross says: "There was considerable dispute between them, (Hart and Brady) but it was at last agreed between them that the *tree* above mentioned should be taken as the *starting point,* and the Commissioners should lay off that street (Market-street) as the dividing line between them. Before the Commissioners would proceed to lay off the town the question was asked by the witnesses of both Hart and Brady, if they agreed to the street marked as Market-street, but which witness thinks was not at that time called Market-street as the boundary line, and they distinctly stated they were so agreed—that they laid off the town and the streets and squares as marked by the Commissioners—he bought lots one and four in square two on the same day the town was laid off, (also directly west of Market-street) and sold them back to Hart. At this time Hart was living at a house on or very near to what is marked on the plat as lot No. 5 in square two, also directly west of Market-street. He further says that in about a year Brady sold his interest to John Bellamy—that neither Brady nor Bellamy made any claim to anything west of Market-street, but on the contrary acquiesced in it as the boundary line, and witness never heard of there being any other line claimed until about a year or two ago, or perhaps a little longer, and witness bought lots of Brady at same time."

McCormick says: "Mr. Brady *claimed on one side of*

Market-street and Col. Hart the other—they were both present—they commenced at the foot of Market-street.—Hart and Brady each agreed to give one-half of the street. At the time the town was laid off Col. Hart lived near what is now Mr. Frazer's office—Brady in the middle part of what is now Mr. Doggett's house on the east side of Market-street.

We have then a dispute between the owners as early as 1822 or 1824—an agreement to lay out a town on their joint lands (and the town is laid out with one block on the lands of Brady east of Market-street and two of the west on the lands of Hart)—an agreement between them that Market-street shall be the boundary, and each should give half the land for the street; in addition to this, possession by Hart as early as 1822 or 1824 and sales and purchases of lots under this agreement, acquiescence in by the owners of the Masters grant, and by everybody to the time of the institution of the present suit, a period of upwards of thirty years.

That this admission—agreement as to the corner tree and boundary—connected with the action of the parties and others in laying off a town, and buying and selling lots, independent of the acquiescence for thirty years, with the adverse possession of Hogans and Hart and those claiming under them for nearly forty years, were proper evidence for the jury, we cannot hesitate for a moment in declaring.

"There are other declarations which are admitted as original evidence, being distinguished from hearsay by their connection with the principal fact under investigation. The affairs of men consist of a complication of cir-

cumstances so intimately interwoven, as to be hardly separate from each other. Each owes its truth to some preceding circumstance, and each has its inseparable attributes and its kindred facts, materially affecting its character, and essential to be known in order to a right understanding of its nature. These surrounding circumstances, termed the *res gestae,* may always be shown to the jury along with the principal facts, &c.,, 1 Greenleaf, § 108-n.

"There has been a difference of opinion in regard to the declarations of persons in possession of land, but it is now well settled that those in disparagement of the title of the declarant are admissible as original evidence, &c. But no reason is perceived why every declaration accompanying the act of possession, whether in disparagement of the declarant or otherwise, if made in good faith, should not be received as part of the *res gestae.*" Ibid 121.

"The declarations of Smith (who had been in possession of the premises and from whom defendant derived title) while in possession, as to his title, were admissible for defendant; they would have been good against him, and are competent against all who claim under him." 4 John 229; 1 Ibid 343.

"It is not to be controverted that parties whose rights to real property may be perfected, and the boundaries of which may be susceptible of certain and precise ascertainment, may by their acts conclude themselves by establishing other and different boundaries." 4 John. 140; 2 Caine, 146; 10 John, 377.

"Acquiescence in an erroneous location for eighteen years is conclusive upon a party making or acquiescing in such

location." 19 Pick. 445; 6 Wen., 467; Hilliard Real Property, 229.

"Admissions which have been acted upon by others are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced." 1 Greenleaf, §207.

"The admissions of one person are also evidences against another, in respect of privity between them; the term privity means natural or successive relationship to the same right of property, &c." Ibid, 189.

"In other cases where the party by his admissions has qualified his own right, and another claims to succeed him, he succeeds only to the right as thus qualified when his title commenced, &c." Ibid.

"On the same principle other contemporaneous declarations of occupancy have been admitted as evidence of the nature and extent of their title against those claiming in privity of estate." Ibid, §189.

"Long continued occupation under a grant may control courses and distances where no monuments are referred to or when those referred to are gone." 2 Hillard R. P., 347; 9 Pick., 520; 5 Green., 489.

The admission of this testimony is by no means, we think, obnoxious to the objection of proving title to real estate by parol, or varying the boundary of the Maestre's grant from the description given in the deed of trust to Mills. It conduces to establish the eastern line of the Taylor grant differently to where the plaintiff would locate it. Supposing the eastern line unsettled and the boundary in dispute, it settles that it was competent for the parties to terminate the contest and adjust and settle it.

For the reason just stated, we do not think the court erred in admitting in evidence to the jury the deeds enumerated in the bill of exceptions from Isaiah D. Hart to various persons, bearing date previous to the trust deed from Hart to Mills. These were a fair consequence of the agreement with Brady establishing the eastern boundary line. They seem to have been recorded, and may properly be regarded as part of the *res gestae.*

We do not perceive the force of the application for the permission to read the bond of Ashlock to the jury; there is nothing on the face of it, as we understand it, to show "acts of ownership by Hart over the extreme west end of the Maria Taylor grant as claimed by him." The boundary to the south by M'Coy's creek is the only expression in the bond showing any connection with the grant alluded to. It was therefore we think properly excluded.

Nor do we think there was just exception to the charge as to the surveys returned by Geo. I. F. Clark. They had been read in evidence to the jury by plaintiff herself, without objection of defendant, so that their authenticity was not a subject of question, but would seem to have been admitted by both sides. There was no attempt to impeach their verity, and no instruction was needed in their support.

We do not think the instruction that "after so great a length of time circumstantial evidence tending to show the probability that the surveys of either grant covered the land in dispute is sufficient," can be maintained, and very probably goes beyond what the learned Judge himself would think appropriate, on reflection.

There is no error in the ruling that although some por-

ion of the evidence respecting the boundaries of these grants is mere reputation or hearsay, yet such evidence, aken in connection with other evidence, is entitled to respect in cases of boundary when the lapse of time is so great as to render it difficult, if not impossible, to prove the boundary by the existence of the primitive land marks or ther evidence than that of hearsay.

Whilst the ruling as to the effect of the parol declarations and confessions of Brady and Hart are not stated so clearly and fully, and in connection with other acts as to he boundary line, as we might approve, yet it will be seen rom what we have already stated, that the instruction expresses substantially the sentiments and opinions of this ourt as to this testimony. We do not understand the ourt in the instruction as to plaintiff's claim depending n the plat or survey of the lands made by Clark, as reecting the plat and lines run and marked; if considered in his latter point of view it would be evidently erroneous. The court had already instructed as to natural boundaries nd lines already run, as well as to the effect of the admissions of the parties, &c.

Nor do we think there was error in the charge that the urvey of Miller, of 1817, as testified by Suarez, and the ines marked by him, are not conclusive or binding upon ither plaintiff or defendant. To assume the conclusiveness of this testimony would be to take from the jury the lecision of the credibility and sufficiency of the testimony f Suarez.

Whether the royal title to the Maria Taylor grant vested n absolute title before the survey, was a question not conected with the merits and as far as we perceive, of no

practical value in the case. The grant was admitted to be good with the survey, both parties claiming under it, and no question raised by either as to its validity. Where then the propriety of raising the abstract question, that at some point of time and before the survey, it was void for uncertainty.

The 16th, 17th and 18th errors object to the ruling of the court as to the effect of the deed of Hart to Mills for plaintiff; contending that plaintiff was entitled by that deed to connect her western boundary with the eastern line of the Taylor tract, that this description is by metes and bounds, and that Hart, and all persons claiming under him are estopped from setting up any other claim than the one recited in the deed.

It will be seen at once that the establishment of the eastern line of the Maria Taylor tract at Market-street relieves the case from all objection predicated upon this view.

But again, we are of opinion, after due reflection, that this deed must be considered in connection with and in reference to the facts and circumstances preceding it; we allude to those deposed to by Ross and McCormick which we give weight to, as the verdict has been in favor of defendant, and to the acquiescence of the parties to the time of the sale to Mrs. Doggett. This will give to the Maestre tract some thirty acres beyond the amount of fifty acres granted by the Spanish Government, preserve the rights of parties existing now for near forty years undisturbed, and without violating any principle of law or equity. Were this not a satisfactory conclusion to our minds, we should most probably be constrained to hold that the call in the deed to unite

the two tracts was a mis-description inconsistent with the leading and main and principal object of the deed, which was to convey the Maestre grant derived from the Spanish Government and from him to Brady, Bellamy and Hart to plaintiff. And there is much reason and foundation for such opinion. It is very obvious that these two grants do not unite by any call in common; they were not surveyed so as to unite, and their very appearance on the plat repudiates such connection. The call for course and distance of the Maestre grant gives the full compliment of fifty acres. To unite it with the Taylor grant to the full extent contended for, would probably give eighty acres. Nor is it pretended that there are natural calls to enlarge it, either that the oak on the river or the pine on Hogan's creek, the western line, were or ever were claimed by anybody to be the corner tree of or on the eastern line of the Taylor tract. True, we perceive on the plat of the surveys, outside of the boundaries, the words, "Juan Maestre lands" on the Taylor plat, "Dona Maria Taylor's lands" on the Maestre plat. It would be strange indeed that these should be construed as extending the boundary of either, but suppose they do, is the extension to be on the part of the Maestre grant and not on the other? Had Hart in his deed conveyed the lands in the Maestre grant, and any other intermediate land between that and the Maria Taylor grant as surveyed by course and distance, there would be greater room for the position. Admitting that there was doubt even upon the Ross and McCormick testimony, as to the corner tree and eastern line of the Taylor grant, it was competent for the owners to adjust it and to settle and fix the lines, and to treat with persons in buying and

selling in reference to such line as established, especially in a case of such notoriety as the present.

In the construction of a grant the court will take into view the attendant circumstances, the situation of the parties, the state of the country and the thing granted. 2 Hilliard Real Prop. 328; 3 Mass., 352; 4 Ibid., 205; 10 Ibid., 459.

We then do not think these objections tenable, though not altogether concurring in the propriety of the instructions themselves. We do not agree to the instruction that in a case of a sale by the owner of one of two contiguous estates, without defining the true boundary, the grantee is estopped to enquire into the original boundary, but must abide by the line claimed by the grantor prior to his acquisition.

Nor do we assent to the instruction that a disputed question of boundary is forever put at rest by the vesting of both estates in the same person, and that all persons claiming under him are absolutely estopped from asserting the boundary to be other than he had uniformly declared it to be. This would be giving to declarations of a party a sanction and variety far beyond what has ever been claimed for them, and would substitute parol, fluctuating testimony of oral declarations, in place of writing.

Nor do we assent to the ruling that if the owner of two contiguous estates alter the dividing line between them, and afterwards sell either of them by name, his grantee, is cognizant of the alteration, takes the estate with the new boundary. Nor to the next, in which the effect of selling by name is also stated. We regard them as inapplicable

to the case, not justified by the testimony and calculated to mislead.

If the instruction that although quantity yields to course and distance, and yet quantity may and ought to be considered as a description when the exact boundaries are difficult to ascertain, be merely that this may be considered by the jury amongst other things, we may not think erroneous, but it should be so qualified.

Whilst then several of the instructions given to the jury have been found erroneous, yet the inquiry arises as to the finding and whether the judgment should be reversed on account of them. The rule is that there must be some possibility of injury arising out of the matter excepted to. 2 Hill N. Y., 210; Cowen & Hill's Notes to 1 Phil. Ev., 787-8.

An erroneous instruction to the jury cannot be assigned for error, if the verdict is sustained by the evidence. 6 Blatch., 258.

Where a judgment effects the proper results, no matter by what erroneous reasoning it may have been induced, it will not be reversed. 11 Ala., 149.

Although instructions to the jury are not correct, yet if the verdict is right, judgment will not be reversed. 6 B. Mon., 44.

When the jury have given a correct verdict, it will not be set aside for erroneous instructions of the court, when instructions correctly given on those points could not have changed the result. Hill vs. Calvin, 4 How. Miss. R. 231.

Tested by these rules we are of opinion that the verdict is fully sustained by the evidence—that it is right upon the

law and facts of the case, and cannot perceive that the erroneous instruction given can have induced to any injury in the case.

The judgment will therefore be affirmed with costs.

WILLIAM J. BAILEY, APPELLANT, VS. ALBERT CLARK, APPELLEE.

1. Unless the testimony in the case is brought before the Supreme Court by a bill of exception, it cannot regard it.

2. The bill of exceptions is given by the statute of Westm., 13 Ed. I., Chap. 31.

3. It ought to be upon some point of law arising upon the fact.

4. It is not to draw the whole matter into examination again; it is only for a single point, and the truth of it can never be doubted after it is sealed.

5. When there is no bill of exceptions to show on what ground the court decided, it will be presumed that it decided correctly.

6. Every fair intendment is to be made in support of the judgment below.

7. The office of a bill of exceptions is to give the facts on which the court decided, and it should give all the facts bearing upon the decision.

8. On overruling a demurrer, if the demurrant resorts to ulterior pleadings on the same point, the demurrer is waived.

9. The rule that allowed a party who offered no evidence the closing argument has been repeated.

10. As has also the rule which allowed a default for want of a plea, &c., to be entered in vacation.

Appeal from judgment of the Circuit Court, for Hernando county.

The facts as disclosed by the record are fully set forth in the opinion of the court.

J. T. Magbee for appellant.

D. Provence for appellee.

DOUGLAS, J., delivered the opinion of the Court:

This is an action of trespass instituted in Hernando county. The declaration charges the defendant with cutting certain timber from the plaintiff's lands there situate. The defendant put in the general issue and several special pleas, upon each of which an issue of fact was joined, and the case was submitted to a jury, who found for the defendant, and a judgment was entered accordingly, from which the plaintiff appealed to this court. The questions arising upon the errors assigned were argued with great ability at the late session of this Court, held at Tampa.—They were presented, however, as though all the testimony in the case was before the court, but it turns out on an inspection of the record that the following is the only bill of exceptions which it contains, viz: "This cause coming on for trial, the plaintiff's demurrer to the amended third plea of the defendant was argued, and it being considered by the court that the defence set up in that plea was not a

contract or sale, transfer or mortgage of real property, or any interest therein, it was ordered by the court that the said demurrer be overruled, to which ruling the plaintiff by his counsel excepts."

"Upon the further hearing of the cause, when the plaintiff had rested from the examination of his witnesses, defendant by his counsel declined introducing any testimony, and proposed to go to the jury, claiming the concluding argument in consequence thereof. The argument of counsel was then commenced for plaintiff. In reply, defendant, by his counsel, contended before the court that the plaintiff's replication to defendant's amended third plea, was a complete and binding admission by the plaintiff of the existence of the instrument of writing pleaded in said amended third plea, which relieved the defendant from the necessity of otherwise proving the execution of such instrument. The court sustained the defendant's counsel in this position, to which ruling plaintiff, by his counsel, excepts and prays that these exceptions may be signed and sealed by the court, and put on record in said cause; "which it appears was accordingly done.

The instrument set out in the said third amended plea is in the words and figures following to wit: " Received of A. Clark one hundred dollars, being in full payment for the cedar timber upon my land in the Annutliga Hammock, it being the S. E. quarter of section 20, T. 21 S. R. 19 E. and I., hereby give him full permission to cut the same and haul it off said land, and to make roads and use other necessary means for getting off said timber, either standing or fallen and to have full claim to the land until he gets it off.—

Given under my hand and seal at Hernando county, Florida, December 1st, 1852."

"LEWIS JENKINS, [seal."]

In presence of
E. CLARK,
E. B. McDOWELL.

The plaintiff claims the land described in that instrument under a deed from the same Lewis Jenkins, alleged to have been made, executed and delivered on the 12th day of December, A. D. 1852, and the defendant justified the cutting of the timber under the said instrument. The replication to the said third amended plea, which was held to be a full admission of the existence of the said instrument of writing, so as to relieve the defendant from proving its execution, is as follows, viz:

"And the said plaintiff by his attorneys as to the said amended third plea by said defendant now here by leave of the court pleaded, protesting that the said supposed license, if any such was ever given, was obtained by false and fraudulent representation of and by the said defendant, for replication nevertheless in this behalf, the said plaintiff saith, that before the said time when, &c., in the said declaration mentioned, and on divers other days between that time and the time of the commencement of this suit, to wit: on the fiftenth day of December, A. D. 1852, at &c., aforesaid, the said supposed license was revoked, recalled and countermanded by the said Lewis Jenkins and by his authority. And this he is ready to verify, wherefore he prays judgment, &c."

To this replication there was a general rejoinder, concluding to the country.

This court has repeatedly held that unless the testimony

in the case was brought before it by a bill of exceptions, it could not regard it; and moreover, that the bill of exceptions should show that it contains all the evidence bearing upon the question presented, to which it relates. In the case of Dorman vs. Bigelow, Exr. 1 Florida Reps., 281, the court ruled that "a note filed in a case, but not connected with the declaration by a bill of exceptions showing that it had been offered in evidence in the court below, cannot be deemed a part of the record submitted for the inspection of this court; nor can it be brought before the court by an asignment of errors, and remarked, "for aught that appears, other proofs besides the note in question may have been presented on the trial below, and such as may have influenced and determined the verdict and judgment, and there is nothing to show that such proof, if so presented, was inadmissible or otherwise exceptionable at law. In the absence therefore *of a bill of exceptions,* showing the testimony exhibited, the presumption is that there was full and adequate evidence before the jury to warrant and support the verdict." This case was cited and approved in the case of Proctor vs. Hart, 5 Fla. Reps., 469. In that case the nature and office of a bill of exceptions are fuly discussed, and numerous authorities adduced which fully sustain the principles there enunciated, and which upon a full review of them, we still believe to be sound law. In this last case the court observed that "it seemed to have been taken for granted by the counsel who prepared the bill of exceptions and superintended the making up of the record for the court, that it was sufficient if the evidence used or alleged to have been used upon the trial, should appear in and form a part of the

record so certified by the Clerk of the Circuit Court, without having the same incorporated into the bill of exceptions." And added, "such a practice if sanctioned would obviously lead to great looseness and uncertainty, and might work irreparable injury to parties litigant, for it would be to substitute the testimony of the clerk as to what evidence was submitted to the jury, for that of the Judge." A bill of exceptions is made up with care by the Judge under the solemn sanction of his signature and seal, with the aid of the attorneys of the respective parties, "during the term of the court (at which the trial is had) unless by special order further time is allowed," (5 General Rules, 14, 1 Fla. Reps., XVII,) and has absolute verity. In the case at bar, certain testimony, or rather short notes or minutes of testimony, was copied by the clerk into the record, but it does not purport to be the whole of the testimony, and there is nothing to give it verity; and moreover there is nothing to show that it was offered to the jury, or if offered that any objection was made to it, or that any motion was founded upon it, or that there was any ruling of the court against the appellant in regard to it upon any such objection or motion.

A bill of exceptions was necessary to show these matters, if they existed. It was also necessary to authorize the court to take notice of and to act upon it. At common law a writ of error lay for an error in law, apparent in the record, or for an error of fact, where either party died before judgment; yet it lay not for an error in law not appearing in the record, and therefore when the plaintiff or demandant, tenant or defendant, alleging anything *ore tenus*, which was overruled by the judge, this could not be as-

signed for error, not appearing within the record, nor being an error in fact, but in law; and so the party grieved was without remedy. 2 Inst., 426, 2 Bac. Abr. Ed. 1848, p. 112. And therefore it was enacted "by the statute Westm. 2, 13 Ed., 1 Chap., 31, that when one impleaded before any of the justices alleges an exception, praying they will allow it, and if they will not, if he that alleges the exception writes the same and requires the justices will put their seals, the justices shall do so." Our statute, Thomp. Dig., p. 351, sec. 3, No. 1, provides the manner of procuring a bill of exceptions, but leaves its effect to the statute of Westm., which is one of the acts mentioned in our statute adopting the common and statute laws of England, with certain exceptions, Thomp. Dig., p. 21, sec. 1, No. 2

A bill of exceptions ought to be upon some point of law, either admitting or denying evidence, or a challenge, or upon some matter of law arising upon a fact not denied, in which either party is overruled by the court. It is not to draw the whole matter into examination again; it is only for a single point, and the truth of it can never be doubted after the bill is sealed, for the adverse party is concluded from averring the contrary or supplying the omission of it. 2 Bac. Abr. Ed. 1848, pp. 113, 114, and the numerous authorities there cited which show very fully in what cases bills of exception will lie and also those in which they will not lie.

The interesting and important question so well argued and in regard to which there is a very great conflict of authority, viz: whether the timber alleged to have been cut by the defendant on the land of the plaintiff was attached to the freehold and was real estate, or was to be consider-

ed as detached from the land and considered mere personal property, was raised by the plaintiff's demurrer to the defendant's third amended plea, and had the plaintiff rested his case upon the decision of the court upon that demurrer, it might have been here disposed of, but after that demurrer was overruled, the plaintiff (as we have seen) filed a replication to that plea, upon which issue was joined, which issue was submitted to the jury, who found for the defendant; and it is a well settled rule that on overruling a demurrer, if the demurrant resorts to ulterior pleadings on the same point, the demurrer is waived. Burdit vs. Burdit, A. K. Marsh, 143. Beer vs. Phillips, Breese 19, 3 U. S. Dig., p. 162, No. 715. Moore vs. Ress, 1 Morris, 401. In Morrison vs. Morrison, 3 Stewart, 444, it was held that, "when a defendant demurrs and pleads to the same matter, and issues of fact are tried, he will be presumed to have waived his demurrer," and in Porter vs. Lane, 1 Morris, 197, and Dougherty vs. Bridgman, 1 Morris 295, that on overruling a demurrer the party demurring waives his demurrer by pleading anew. In the case of Davis vs. Dickson, 2 Stewart's Reps., 370, it was holden that where a plea in abatement to a writ and declaration is overruled on demurrer, the party cannot insist on the same matter in arrest of judgment if he pleads over; and in the State vs. Bodly, 7 Blackfd. Reps., 355, that if after the refusal of the court to reject a plea, the plaintiff reply or join issue on the plea, the refusal to reject the plea cannot be assigned for error. The principle deducible from these cases is in direct accordance with the ruling of this court on the same question in the case of Mitchell vs. Chaires, Exr. 2 Florida Reps., 18-23, which on the most ma-

ture reflection we still hold to be correct. The case of Mitchell vs. Cotten, Exr. 3 Fla. Rep. 170, has been thought (we understand) to conflict with the case last cited; we deem it proper therefore to say that if there is anything in that case inconsistent with the principle announced in the case of Mitchell vs. Chaires, Exr. on this point, we suppose it must have occurred through mere inadvertence, and hereby expressly overrule it. Whether the document which was made the basis of the third amended plea was submitted to the jury as evidence or not, we are left to conjecture. From the argument of counsel we should suppose it was, but from the bill of exceptions the inference is that it was not, for it states that "when the plaintiff had rested from the examination of his witness, defendant by his counsel declined introducing any testimony and proposed to go to the jury, claiming the concluding argument in consequence thereof." It does not appear, however, whether he had the conclusion or not, and if we could infer that he had it, we should be at a loss to determine from the record, whether it was with or without the assent of the plaintiff; if with it, he had no cause to complain; no question therefore is presented for our consideration in regard to this matter, and it will be soon enough to decide it when it shall be brought directly before the court for its decision. There is no rule prescribed by this court allowing the party in such a case the conclusion; the rule that once existed allowing it, was long since abolished, as was also the rule authorizing defaults to be taken in vacation. We notice this because it appears by the record that a default was taken on behalf of the plaintiff against the defendant, which it has been insisted was set aside on insufficient

grounds. The setting aside of a default was at common law a matter of discretion with the court which could not be assigned as error. Whether under our statute it is matter for exception is a question, which from the turn this case has taken we are not now called upon to decide; but if it were otherwise we could not do so, because the grounds upon which the court decided have not been brought before us by a bill of exceptions, and we are bound therefore to presume that the Circuit Court acted right in opening it. In the case of Blaney vs. Findley et al., 2 Blackfd. Reps. 338, the court said, "there is no bill of exceptions to show us on what grounds the court decided; the presumption of law is in favor of the decision." This case was cited and approved in the case of Mitchell vs. Chaires, Exr. 2 Fla. Reps., 22, and in concluding that case the court said, "as there were several distinct issues that required proof on the part of the plaintiff to sustain them, and a verdict was rendered for the defendant upon them, and there is no bill of exceptions to show us on what grounds it was rendered, we are bound to presume that the verdict was right, and to sustain the judgment entered upon it." This case is very much like the one now before us, and is sustained by that of Horn vs. Gartman, 1 Florida Reps., 63, 91, in which the court held "that every fair intendment is to be made in support of the judgment below," and that "the office of a bill of exceptions is to give the facts on which the court decided, and that it should give all the facts bearing upon the decision, so that the Appellate Court may know fully and clearly everything which influence the decision of the court." In the case of the Bk. of Virginia vs. the Bk. of Chillicothe, 16 Ohio Reps., 172, the Supreme Court of Ohio

held that "an agreed statement of facts which constitutes the evidence in a case, cannot be regarded as a special verdict, and forms no part of the record unless made so by a bill of exceptions." And in that of Mitchell's Admr. vs. Byrd & Gunn, 2 English's Reps., 408, it was held that "unless the bill of exception negatives the idea that other testimony was adduced in the court below, the appellate court will presume in favor of the judgment below.

In closing our remarks in this case we may, we think, with propriety say that it is always unpleasant to the court to be prevented from deciding the merits of a cause upon any technical grounds, but that we feel the less reluctance in affirming the judgment of the Circuit Court in this case, because we consider the said third amended plea, if sustained by proof, a good defence to the action, so far as regards all the timber cut by the defendant before he had any notice, actual or constructive, of the purchase of the lands on which it was cut, by the appellant; but we are by no means satisfied that it is a good defence for any cut afterwards. Let the judgment be affirmed.

GEORGE MCMILLAN, PLAINTIFF IN ERROR, VS. ARCHIBALD LACY, DEFENDANT IN ERROR.

1. Trespass, *quare clausum fregit*, is a local action in which the plaintiff is

required to prove that the place is within the jurisdiction of the Court, and the defendant may show by testimony that it is not within it.

2. A plea that a difference exists between the States of Georgia and Florida as to whether the premises lie within the jurisdictional limits of the State of Georgia or the State of Florida; that the premises are claimed by the State of Georgia to be within her jurisdiction; that no line has been run and marked defining the boundary between the States; that A. having judgment and execution on recovery of a claim of land against one M., the sheriff by virtue thereof executed the writ by putting out the goods and chattels of plaintiff L and delivering possession to defendant, as agent of the plaintiff in execution, is not a good bar to the action.

Writ of Error to a judgment of the Circuit Court for Jefferson county.

This was an action of trespass instituted by the defendant in error against the plaintiff in error and others for entering the house and premises of the plaintiff, alleged to be in Jefferson county in this State, and expelling him and his family therefrom, and throwing his furniture out of doors, &c.

Process was served on plaintiff in error only, who appeared and filed three pleas.

The first was the plea of not guilty. The third that the premises were not in the State of Florida. The second was a special plea alleging in substance that a difference exists between the States of Georgia and Florida as to whether the premises lie within the jurisdictional limits of the State of Georgia or the State of Florida; that the premises are claimed by said State of Georgia to be within her jurisdiction; that no line has been by authority run and marked defining the boundary between said States; that Archibald McMillan having impleaded one Charles McCoy,

tenant in possession at the time, in the Superior Court of Thomas county, Georgia, of and concerning the identical land in the declaration mentioned, recovered a judgment in said court, and obtained an award of a writ of *habere facias possesionem;* that the sheriff of Thomas county, in executing the command of said writ, necessarily entered the house and put out the goods and chattels of plaintiff, and that said Sheriff delivered the possession thereof as the agent of said Archibald McMillan, &c.

To this plea there was a demurrer, which being sustained by the court, defendant excepted.

The issue upon the first and third pleas were submitted to the jury, who returned a verdict for eight hundred dollars, upon which judgment was entered.

From the judgment sustaining the demurrer to the second plea, plaintiff in error prosecuted his writ to this court.

M. D. Papy for plaintiff in error.

John Erskine for defendant in error.

BALTZELL, C. J., delivered the opinion of the Court.

This was an action of trespass *quare clausum frigit* instituted by the plaintiff Lacy against the defendant McMillan and others, for entering the close and house of plaintiff situate in Jefferson county in this State, and expelling him and his family with force, and throwing his furniture out of doors.

The process was served on one of the defendants only, who appeared and filed three pleas—the first not guilty, the second a special plea, and thirdly a plea that

the premises in the declaration mentioned are not in the State of Florida. The case was submitted to the jury on the 1st and 3d pleas, who found for the plaintiff and assessed the damages at $800. To the special plea a demurrer was filed which the court sustained, and the correctness of this ruling is the only subject of complaint in this court.

This plea alleges that a difference exists between the States of Georgia and Florida as to whether the premises lie within the jurisdictional limits of the State of Georgia, or the State of Florida; that the premises are claimed by said State of Georgia to be within her jurisdiction; that no line has been by authority run and marked defining the boundary between said States; that Archibald McMillan having judgment and execution on recovery of a claim of land against one Charles McCoy, the Sheriff by virtue thereof executed the writ by putting out the goods and chattels of plaintiff Lacey, and delivered the same to defendant as agent of said McMillan. Such is the substance of the plea. It is very obvious that this entire defence is disposed of by the plea of the general issue and the third plea alleging that the premises are not in the State of Florida.

"Under the plea of not guilty the plaintiff will have to prove the trespass, the place in which it was committed, so as to make it correspond with the description of the *locus in quo* in the declaration, and the damage." 1 Arch. N. P. 314. "The parish and county also stated in the declaration by way of local description must be proved as laid; a variance would be fatal." Ibid. 317. "The defendant may disprove everything which it is incumbent on the plaintiff to prove, namely, the

trespass, the matter of aggravation, &c., or that it was committed in the place described in the delaration." Ibid. 318.

It is a general rule that a plea which amounts to the general issue is bad; Arch. Pl. & Ev. 173.

The premises then being out of the jurisdictional limits of the State of Georgia, what pretext is there for the exercise of jurisdiction by her courts. In justification of such an act it will not do to cite authorities to the effect that a judgment is conclusive and that a sheriff is bound to obey the mandate of his court. These all apply to cases within the jurisdiction of the court and not to acts committed within a foreign sovereignty and jurisdiction. Can it be credited for a moment that Georgia would tolerate the service of process by an officer within her limits or permit the jurisdiction of our courts there.

Independent of this the addition to the plea of the fact that the Supreme Court of Georgia and adjudicated upon the subject matter of contest, by no means strengthens the defence impaired as it is by the other statements preceding it, of the difference between the two States—the premises in contest being claimed alike by Georgia and Florida and no boundary line being run. For this action is strictly local in its character, and may not be brought out of the jurisdiction in which the alleged injury was committed.—Livingston vs. Jefferson, 1 Brokenborough.

The allegation is not that the premises are within the jurisdictional limits of Georgia, but are claimed to be. Such an allegation may be regarded as an admission of the right being with the State of Florida. Certainly no assumption of jurisdiction can with propriety be based on a claim

hich will not bear the assertion of right, and put in issue ıe fact of its existence. It is easily perceived that there ın be no traverse or denial of the fact that Georgia laimed this district or country, nor would the fining of ıch a fact determine the points at issue. The verdict of ıe jury establishes the fact of the locality of the prem-es. Are we on the mere suggestion of the contrary to ɔnclude that their finding is enough, and that the reverse the fact?

But we see nothing in the judgment or executions referred ɔ, to conclude the rights of plaintiff Lacey. The sheriff had o authority under the latter to turn him out of possession. [e is not proved to be in privity with McCoy, the defen-ant on the record, either as tenant, lessee or in any other ıape. It is true there may be some confusion in the Eng-sh books on the subject, but the right and justice of the ıatter agree with the view taken by the American author-ies. "A judgment is evidence of the right of entry, as be-veen parties and privies, so as to protect the lessor in jectment against an action of trespass." 13 John. 229.

"An alias writ of *habere facias* will be granted where a erson is dispossessed by a person claiming under defen-ant's title, but this does not extend to a stranger." 11 Yend. 182, 4 Ala. 582.

On the whole case we see nothing to make us question ıe correctness of the judgment of the Circuit Court. It therefore affirmed with costs.

MEM.—At the hearing of the following cases included in the preceding volume of these reports, Baltzell C. J. did not preside, his place be supplied by one of the Circuit Judges, viz: White vs. Walker, Simpson, Admr., vs. Barnard Adams & Co., St. Andrew's Bay Land Company vs. Campbell.

REPORTS

OF

CASES ARGUED AND ADJUDGED

IN THE

Supreme Court of Florida,

AT

TERMS HELD IN 1856.

By MARIANO D. PAPY, Reporter.

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JUDGES OF THE SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

HON. THOMAS BALTZELL, CHIEF JUSTICE.

HON. BIRD M. PEARSON,*
HON. CHARLES H. DUPONT, } Associate Justices.

MARIANO D. PAPY, ATTORNEY GENERAL.

JUDGES OF THE CIRCUIT COURTS.

HON. WILLIAM A. FORWARD, JUDGE EASTERN CIRCUIT.
HON. THOMAS F. KING, JUDGE SOUTHERN CIRCUIT.
HON. J. WAYLES BAKER, JUDGE MIDDLE CIRCUIT.
HON. JESSE J. FINLEY, JUDGE WESTERN CIRCUIT.

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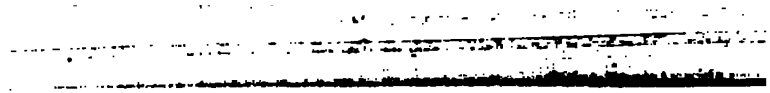
*Elected in place of Hon. T. Douglas, deceased.



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NOTE.—The head-notes in each case were prepared
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DECISIONS

OF THE

Supreme Court of Florida,

AT

February Term, 1856,

Held at Tallahassee

THOMAS J. LINTON, APPELLANT, VS. DENHAM & PALMER AND MINOR WALKER, APPELLEES.

1. The principle affirmed in the case of Carter vs. Bennett, et al. 6 Flor. R. 236, viz: that when all the equities of the bill are denied by the answer, it is not of course to dissolve the injunction; the granting and continuing of injunctions rest in the discretion of the court to be governed by the nature and circumstances of the case—cited and approved.
2. When the facts, circumstances and law of the case presented in the bill and answer afford a strong presumption that the complainant may be entitled to relief upon the final hearing, and in the meantime might suffer irremediable injury, the injunction should be continued to that period notwithstanding the general denial of the equities of the bill, in the answer.

This is an appeal from an interlocutory order of the Circuit Court, for Jefferson county, dissolving the injunction granted in this cause. The allegations of the fact presented by the bill and answer are fully set forth in the opinion of the court.

Archer & Papy for Appellants.

M. A. Long and W. S. Dilworth for Appellees.

PEARSON, J., delivered the opinion of the court

This is an appeal from the Circuit Court sitting in Chancery for Jefferson county, for granting an order dissolving an injunction upon the coming in of the answers, which had been previously allowed in this case.

The case made by the bill is, that the defendant Minor Walker, on the 1st day of January, 1850, did, by his covenant under seal, amongst other things, hire, for the space of five years, fifteen negro slaves, therein named, to the complainant. In consideration whereof, the said complainant agreed to pay the said defendant Walker the sum of $6000, in five equal annual instalments of $1200 each, to become due respectively on the 1st day of January in the years 1851-2-3-4 and 5, for which several instalments the complainant executed his five several promissory notes to the said defendant Walker. And that, at the time of this transaction, Walker was and still is insolvent, and dependent mainly for the support and maintenance of himself and family upon the debt thus contracted in his favor. That the complainant made frequent advances to the said defendant Walker for necessaries, &c., the amount of which consisting of many small items, were not endorsed by way of credit upon the said notes at the time they were made, by reason of the inconvenience of the same, and the confidence existing between the parties to the transaction, but that these advances were made with the express understanding that they should constitute off-sets in favor of the complainant, upon the settlement of said promissory notes, with interest at the rate of eight per cent. up to the maturity of such of the said notes as they might be applied

to, and that these advances, up to the filing of this bill, amounted to $1002.38, including the hire of the negro girl Ciller for the years 1852-3 and 4, who was one of the negroes mentioned and included in the original covenant of hiring between the said defendant Walker and complainant, and rehired by complainant to said defendant Walker, after deducting the said defendant's open account against complainant, a statement of which is filed and marked exhibit B. This bill further alleges that the greater part of these advances was made in the year 1853, and should have been applied to the extinguishment of the balance due upon the instalment falling due on the 1st of January, 1854—that the note for the instalment due at that time had been settled and taken up by complainant on the 1st day of June, 1852, and a new note then given to the said defendant Walker for a balance of $431.85 of that instalment, payable at the period at which the said instalment would fall due—the 1st Jany., 1854. It is charged in the bill that this note remained in the hands of defendant Walker until it was over-due, and was then transferred by him to the defendants, Denham & Palmer, who were merchants, to secure a debt the said Walker owed them, regardless of the complainant's right to set off his advances to the said Walker against it. That complainant expostulated with the defendants Denham & Palmer, for having taken the said note, insisting that he had already paid it by his advances to the said Walker, and could make a successful defence if the same was put in suit. That the defendants, Denham & Palmer, knowing these facts, besought complainant to allow them to keep the said note for the security of their debt, while he, the complainant, could set off his advances to the said Walker against the last of said notes which would fall due on the 1st of

January, 1855, and that complainant, being on friendly terms with the said Denham & Palmer, consented to this arrangement for their security and protection, it being generally understood that the negroes in question were under mortgage to the Union Bank of Florida, that sundry judgments existed against said Walker, and he knew to be insolvent. That at this time, in the store of Denham & Palmer, a rough estimate was made by William Denham, one of the firm of Denham & Palmer, of the amount of complainant's claim upon said Walker, with interest up to the maturity of the complainant's only remaining note, which would fall due on the 1st January, 1855, which original estimate is filed with the bill, marked exhibit C, and alleged to be in the hand-writing of said William Denham, and exhibits the amount of 848.50 dollars, including interest, as being due to complainant by defendant Walker at the maturity of said note on the 1st January, 1855, the said note being negotiable and made payable to said defendant Walker or order. That complainant then sought to have a settlement with the said Walker, but failed on account of Walker's inattention to business; but Walker being urged, finally handed the said note of $1200 to complainant, and directed him to make out his account and credit the amount upon the note. Complainant took the note and carried it home, but reflecting that Walker ought to be present and assist in the settlement, complainant declined placing any credit upon the said note until the said Walker should by himself, or through some competent friend, examine and satisfy himself of the correctness of complainant's account, and accordingly returned the note to said Walker. The bill further alleges that soon after these last occurrences, the defendant Walker delivered the said note to the defendants, Denham & Palmer, as collateral security for an in-

considerable store account which he owed them, and when questioned on the subject by complainant, showed him the receipt of the defendants, Denham & Palmer, for the said note, to be held as collateral security for the debt of him, the said Walker, declaring to complainant that the only object that he had in view was to appropriate the balance that might be due on said note after all complainant's proper credits had been given. But nevertheless the said defendants, Denham & Palmer, have sued complainant in said note, and combine, with the defendant Walker, in refusing to allow complainant any credit whatever upon the same.

That Darius Williams, one of the firm of Denham & Palmer, said to complainant that the said firm would not have traded for said note but for the fact that they had heard complainant say that he might be compelled by law to pay the same over again, provided the said defendant Walker should negotiate it before due.

To the truth of the foregoing narrative of facts, which are elaborately set forth in the bill, the defendants are minutely and circumstantially interrogated in twenty-three interrogatories appended thereto.

The answer of the defendant Walker, so far as the same is responsive to the bill, admits the covenant of hiring and the delivery of the negroes therein mentioned to complainant, and the re-hiring of the girl Ciller to him, the defendant Walker, the settlement with complainant, on the 1st June, 1852, and the execution by complainant of the note of 431.85 dollars, for the balance found due on the instalment for negro hire falling due on the 1st January, 1854. And the answer states that all or most of the items of complainant's account against defendant exhibited in his bill were deducted from the note settled on this occasion,

or from the said complainant's notes for previous instalments. That after this settlement, he, the defendant Walker, "may have" drawn some drafts for small amounts of money on complainant, but denies that it was understood that the same should constitute credits on either of the notes then held by defendant upon complainant, but that the same should be deducted from said defendant's account against complainant, (which the answer says is "positively set forth" in complainant's exhibit B,) and from the hire of the negro Drew. The answer then proceeds to dispute the accounts between the said defendant Walker and complainant, and asserts the said defendant's "belief" that complainant, on a fair and full settlement, would be indebted to him in "a large sum of money" over and above the said note of $1200. It further admits that the defendant Walker did, in the early part of the year 1853, transfer the note of $431.85 to the defendants Denham & Palmer, to whom he was indebted, and that at the maturity of said note, they allowed him the full amount of it to his credit. That on the 1st January, 1854, the defendant Walker was indebted to the defendants Denham & Palmer to the amount of about $350, and that in the early part of that year he transferred to them by delivery, the said note of complaint for $1200, due on the 1st of January, 1855.—But that soon after the delivering of said note to the said Denham & Palmer, they called his attention to the fact that it needed endorsement to complete the transfer, and then he endorsed it as they desired. That the defendant Walker was at the time of the said transfer of said note purchasing supplies of the defendants Denham & Palmer, but that he does not know to what extent his account had run at that time, but that the whole amount of said note was passed to his credit by them, at its maturity on the 1st of

January, 1855, and a small balance remaining in his favor was paid to his order. That at the time of the transfer of said note to the defendants Denham & Palmer, the defendant Walker told them he owed the complainant a small beef account which they must "deduct from said note," but that complainant refused to make out and receive the amount of said account. That the said note was transferred to the said Denham & Palmer absolutely, with the understanding that it should pay whatever amount the defendant Walker then owed them, and whatever amount his account might amount to during the year 1854, the balance, if any, to be paid over to said Walker in cash.

The answer of said defendant Walker further admits that he did take a receipt for the said note from the defendants Denham & Palmer, but that he does not know where it is nor remember the contents of it, but that its object was to show the amount of the credit to which he would be entitled in consideration of it with the said defendants Denham & Palmer. It states that the said defendant Walker "does not recollect" and denies that he ever gave the said note to complainant for the purpose of having any credits placed upon it, and that there was no understanding that complainant's advances should be deducted from said notes, although he admits that previous to the settlement of the 1st June, 1852, he had given orders for certain debts he owed, on complainant, (which he does not recollect), and that they were included in that settlement and deducted from the to them in the sum of $339.40 on account for the year 1852, and that on a further settlement up to the 1st of January, 1854, the said Walker remained in their debt in the sum note for the instalment falling due on the 1st Janustitute the firm of Denham & Palmer, answered and say, they admit the hiring of the negroes as set forth in the bill, but know nothing of any understanding between complainant

and defendant Walker that the advances made by the former should constitute credits on his notes for negro hire held by the latter, nor can they say whether the defendant Walker is or is not insolvent, though they have heard that outstanding judgments and executions exist against him. They have no means of ascertaining the correctness of complainant's account against the defendant Walker, but they admit that exhibit C, containing a statement of that account, was made in their store and is in the handwriting of William Denham, one of the partners in their firm. They admit the transfer of the note of $431 85 to them by defendant Walker on the 28th January, 1853, and that the same was charged to complainant and subsequently settled by him without complaint or objection. That at the time of the transfer of said note, defendant Walker was indebted ary, 1854.

The defendants, Denham, Palmer & Williams, who con- of $361.60. They know not for what purpose the note of $431.85 was given, and deny that they solicited the complainant to waive his claim to set off his account upon defendant Walker against the said note and reserve it to be credited upon the note of $1200 still in the hands of said Walker. This last note of $1200 due the 1st day of January, 1855, these defendants say was transferred to them by delivery in the early part of the year 1854, but that afterwards discovering that the said note was payable to order, they called the attention of defendant Walker to this fact and he then endorsed it. The consideration of the transfer of said note was the defendant's store account for the year 1853, amounting to $364.60, and the account which he was then running up for the year 1854, the amount of which, at the time of the transfer of said note, these defendants do

not know. But it was agreed that at the maturity of the said note on the 1st day of January, 1855, their whole account should be taken out of the note, and the balance paid to said Walker. This balance they allege amounted to $55.44 and was paid to the order of said Walker. They deny that they had any conversation with complainant in relation to the said note of $1200 until after its transfer to them, but admit that at that time the defendant Walker informed them that defendant had a small beef account which was to be paid out of the said note by them. That they informed the complainant of this, but that he refused to render in the account or receive the amount of it, and that they settled with the defendant Walker, irrespective of the beef account. They allege that they brought suit against the complainant on the said note at his own request, and recovered judgment on the same in Jefferson Circuit Court, on the 12th November, 1855, for the sum of $1262.42 and costs.

After the transfer of the said note of $1200 to them, these defendants say they did have a conversation with the complainant, in which they offered to pay him any balance that might be found due him on settlement with the defendant Walker, provided the said Walker was willing, but that the said Walker refused to accede to the arrangement. And they admit that they did give the said Walker a receipt for said note, which is not in their possession, nor do they know where it is. They do not remember the language of the receipt, but its object was simply to show that the said Walker was entitled to a credit for the amount of the note. They allege that they have no recollection of exhibiting the said note to complainant until after it was due and presented for payment, nor did they ever hear that complainant claimed any equities against said note until the filing of his bill. They deny all knowledge of any ad-

vances made by complainant to defendant Walker on the notes held by said Walker against him, though they have heard complainant say that he had paid debts for Walker, and they have no recollection of any conversation with complainant in relation to his offsets against said note, and deny that the said Darius Williams ever said to complainant that they would not have traded for the said note but for having heard the complainant say that he might be compelled to pay the note again, should it be traded by said Walker.

All the defendants deny generally all fraud, combination, &c. There are some other matters set up by way of defence in the answer, but not being in response to the charges and interrogatories of the bill, they are not proper to be considered upon the interlocutory question now presented. It was held by this court, in the late case of Young and Bryan vs. McCormick, 6 Fla. Rep., 368, that "where a new equity is set up by the answer to avoid that set up by the bill, the court will not regard it upon motion;" and in the same case the court declared its purpose, "on a motion for an injunction, not to commit itself to points or questions that may arise at the final hearing." thing in this case definitely, except the question of injunc- We are not to be considered, therefore, as determining anytion. That is in fact all that is before us. It will be time enough to consider the merits when they shall have been adjudicated in the court below, and the decree of that court brought before us upon appeal.

That the complainant would be entitled to relief, upon the case presented by his bill, is unquestionable; and upon the extent to which that case is modified by the answers of the defendants, will depend the determination of the question under consideration. Upon a motion to dis-

solve an injunction after the coming in of the answer, the defendant is the actor, and the court will presume against him when he does not answer fully and circumstantially. Judge Story, in his Equity Pleading, sec. 852, says: "An answer must state facts and not arguments. It is sufficient that it contains a general denial of all the matters charged, but there must be an answer to the sifting inquiries upon the general subject." Tried by these rules, what is the effect of the answers in this case? The principal point—the insolvency of the defendant Walker—is wholly evaded by him in his answer, while the other defendants say they do not know whether he is insolvent or not. The rule in Chancery is that whatever is well pleaded and not denied, is admitted. The insolvency is therefore established; and with this knowledge on the part of Denham & Palmer, if they were also acquainted with the course of business between complainant and Walker, and the fact that complainant had made considerable advances to Walker in the way of payment for the 1200 dollar note, for which they traded, then equity would compel them to admit the set-off claimed by complainant against the note. It is true that they in general terms deny this knowledge, but their admissions render it manifest that they should have been better informed. Walker was their customer, and had settled his account with them, by their own admission, the previous year, by passing to them the complainant's note for $431 85, upon which occasion Denham, one of the firm, made out a statement of the complainant's advances to Walker on the note which Walker afterwards assigned to them. And it should be observed that the interest is calculated carefully upon each item of this account up to the maturity of that note, thus connecting this account and note together under the very eye of the de-

vances made by complainant to defendant Walker on notes held by said Walker against him, though they heard complainant say that he had paid debts for W and they have no recollection of any conversation complainant in relation to his offsets against said and deny that the said Darius Williams ever said t plainant that they would not have traded for the s but for having heard the complainant say that he compelled to pay the note again, should it be t said Walker.

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fendant Denham. Defendant Walker, too, substantially admits that the admission of complainant's account as offsets at former settlements, had been the practice between him and complainant. It would seem that a man might be expected to have some knowledge of an important business matter which he acknowledges to be in his own hand-writing. Nor is the positive oath of the complainant, that the note in question was transferred as collateral security only by Walker to Denham & Palmer, and that he the complainant read their receipt for it to that effect, fully met by the answers. The defendants all confess that the note was not endorsed when first delivered to Denham & Palmer. The receipt is not produced or accounted for, and the defendants answer with a remarkable coincidence of expression that they do not know where it is, nor remember the contents, but its object only. It is admitted that when the note was transferred to Denham & Palmer, they were informed that he owed complainant a beef account, which must be paid out of it, which they actually offered to do, and further proposed to pay complainant his debt against Walker, provided Walker would consent. Walker refused and stated that complainant owed him a "large sum of money" irrespective of the note, while in his own answer he confesses that at the time of the transfer of the note, he directed Denham & Palmer to pay his beef bill out of it. Walker being insolvent, Denham & Palmer had a strong motive to secure the note to protect themselves in their debt, and could hold the excess in trust for Walker. All these circumstances taken in connection go far to raise the presumption that Denham & Palmer should have known the business relations affecting the note, between complainant and Walker.

In Carter vs. Bennett, *et al.*, Fla. Rep., p. 236, this court cites with approbation, Chancellor Kent in Robertson vs.

Anderson, 2 John. Ch. R where he says, "That even where all the equity of the bill is denied by the answer, it is not of course to dissolve the injunction, as the granting and continuing the injunction rests always in the sound discretion of the court, to be governed by the nature of the case." In this case the complainant's equity to have his payments or advances set off against a debt due to an insolvent creditor, where his own debt to such a creditor must be presumed to have been the foundation upon which he trusted such a creditor, is very clear. Story's Equity Jurisprudence, page 890, *et sequiter.* Is this equity lost by reason of the insolvent assigning a negotiable instrument to a third party who had notice of the relation in which the parties stood to each other? Certainly not. The hire of the negro Ciller to defendant Walker by complainant, she being one of those included in the original covenant, and her hire being part of the consideration of the note in question—the taxes and physician's bills, all of which go to make up the complainant's claim of set-off, are connected directly with the negroes and the note given for their hire. The case of Kilcrease vs. White, 6 Fla. Rep. 45, has been cited to us to show that under such circumstances the set-off would be allowed, even at law; and we have been referred to the case of Rosa vs Brotherson, 10 Wend., 85, to show that "where a creditor receives the transfer of a negotiable note in payment of a *precedent debt,* he takes it, although transferred to him before maturity, *subject to all equities* existing between the original parties." Now the note in question was transferred to pay a precedent debt to Denham & Palmer by their own confession, while they held the surplus to secure another debt not then contracted. But we would avoid entering upon the law and merits of the case, in its present stage, further than to express our opinion, that

where the facts, circumstances and law of the case, as presented in the bill and answer, afford a strong presumption that the complainant may be entitled to relief upon a final hearing, and in the meantime might suffer irremediable injury, the injunction should be continued to that period, notwithstanding the general denial of the equities of the bill in the answer.

Let the order of the Circuit Court dissolving the injunction be reversed, and the case remanded for further proceedings.

BENJAMIN G. THORNTON, JR., ET AL. APPELLANTS, VS. FRANCIS EPPES, EXECUTOR, &C., OF J. K. CAMPBELL, DECEASED, APPELLEE.

1. A second suit will not be allowed when it appears that a judgment, whether by confession, upon demurrer or verdict, and still in force, has been rendered in a former suit, by a court of competent jurisdiction, for the same subject matter, for the same purpose, and a trial was had upon the merits. The same rule prevails in courts of law and equity, but there are instances forming exceptions to this general rule in which, under peculiar circumstances, equity will entertain a second suit for the same cause of action and the same purpose.

2. It is not a sufficient ground to entertain a bill in equity that on a trial of the same question in a suit at law, upon an issue involving the merits, the jury gave a verdict for the defendant, because of an instruction by the court that if they believed the evidence, the right to sue at law was not in the plaintiffs but another person, or that the plaintiffs should go into a court of equity, though that instruction was erroneous. The only way of avoiding such an instruction are by taking a non-suit before the jury retired, or obtaining a reversal of the judgment.

3. If a party intends to rely upon a matter as constituting a ground for relief in equity, it ought to be set up in the bill; if not so set up, though it ap-

pears by the evidence in the record to have been proved, it will not be considered at the hearing.

4. When a Court of Equity has concurrent jurisdiction with a Court of Law, of a question which has been already tried at law, the Court of Equity will not entertain a suit to try the same question, because of some matter of which the plaintiff could have availed himself had he first sued in equity.

This is an appeal from a decree of the Circuit Court of Leon county.

The complainants filed their bill claiming certain slaves under a deed made in 1819 by Benj. G. Thornton conveying certain lands and negroes in trust to Wesley Adams for the benefit of the wife of Benj. G. Thornton and her right heirs, with the power of appointment by Mrs. Thornton. Mrs. Thornton having died without making an appointment, complainants, who are her children, claim that they are entitled to the property in question under the provisions of the deed above referred to. In the year 1832 an execution against Benjamin G. Thornton was levied on two negroes mentioned and conveyed in the deed of trust aforesaid, and at the sale they were purchased by the defendant's testator, in whose possession they remained until his death, and afterwards in the possession of defendant as executor.

In the year 1837 an action of detinue was brought by complainants in Leon Superior Court against defendant as executor as aforesaid, for the recovery of the slaves, in which a verdict and judgment were rendered for defendant. It appears that on the trial of this action, the Judge instructed the jury "that on the showing of plaintiffs it was not competent for them to recover—that the title exhibited by the plaintiffs to the jury was variant from that declared on—that the evidence exhibited, if believed by the jury, showed the title to be in Wesley Adams, trustee, who was only competent to sue in that form of action—that if there was any title in the heirs of Mary Thornton, it

should have been asserted in the name of Wesley Adams, trustee, or by bill in equity."

The bill filed in this case alleges that as the court decided that a court of law could not take juricdiction of the case, the complainants, acting upon the suggestion of the Judge who tried the case, that a bill in chancery would lie to assert their rights, filed their bill for that purpose.

The complainants also allege that these slaves are family servants and therefore are of peculiar value to them beyond the ordinary prices attached to this species of property.

The defendant sets up in his answer the judgment rendered in the said action at law, by way of plea, as a bar to this suit.

The plea was sustained by the court below and the complainants appealed.

Archer & Papy for Appellants.

Long & Galbraith for Appellees.

His Honor THOMAS F. KING, Judge of the Southern Circuit, (who presided in this case in lieu of Hon. T. Baltzell, C. J., disqualified to sit,) delivered the opinion of the court.

The complainants found their claim upon a deed made in 1819, by Benjamin G. Thornton, of certain lands and negroes to Wesley Adams, in trust for the benefit of Mary Hall Thornton, wife of Benjamin G. Thornton, and her heirs. The deed, after directing the payment of certain debts and giving to Mrs. Thornton the power of disposing of the property to such uses and such persons as she might appoint, provides that "if she should die without making any such direction or appointment, then all the benefit, use and advantage of the said trust to revert to her right

heirs." Mrs. Thornton died without having made an appointment, and the complainants claim that they, as her heirs by virtue of this provision, are entitled to the two negroes here sued for as part of the property conveyed in the deed. In 1832, an execution against Benj. G. Thornton was levied on the two negroes, and at the sale under the execution they were bought by John K. Campbell, and have ever since been in his possession and that of the defendant, as his representative.

In 1837, an action of detinue was brought in Leon Superior Court, by these complainants, against the defendant, in the same capacity in which he is now sued, for the recovery of the negroes, and at the trial of that suit at the fall term of 1837, a verdict and judgment were rendered for the defendant. Soon after that, this suit in Chancery was commenced for the same slaves.

In his answer to the bill, the defendant has set up, by way of plea, the judgment in the action of detinue, which is in full force, as a bar to this suit. The Circuit Court sustained the plea, and from its decision this appeal was taken. The first question for us to determine, then, is as to the sufficiency of this plea. If it be good, it is unnecessary to enquire further into the case.

The rule is that a second suit shall not be allowed when the judgment in the first, whether upon confession, demurrer or verdict, and still in force, was given by a court of competent jurisdiction, and was for the same subject matter, for the same object, and the case was tried upon the merits. And the same rule prevails in courts of law and equity. 5 Bac. Abr., Tit. Pleas and Pleading; Irwin vs. Knox, 10 John. 374; Louw. vs. Davis, 13 John. 227; Snider et al. vs. Croy, 2 John. 227; Behrens vs. Sieveking, 2 My. & Cr. 602; Behrens vs. Pauli, 1 Keene, 462; Orcutt

vs. Orms, 3 Paige, 463; 2 Dan. Ch. Pr. 758. It appears that in this suit, and in the action of detinue, the parties are the same and the purpose the same.

But there are instances forming exceptions to the general rule, in which Courts of Equity, notwithstanding the subject of the suit and the purpose are the same, will, under peculiar circumstances, entertain a bill and grant relief, and we will now consider the grounds relied on by the complainants to exempt the suit from the force of the rule as to former judgments.

It was insisted in argument by the counsel of complainants, as a ground upon which the bill should be entertained, that the complainants were infants when the suit was brought at law. Whether, upon general principles, this would be a sufficient ground to authorize a new suit, it is unnecessary for us to determine here. There is no allegation in the bill that the complainants were minors when they sued at law, nor is there sufficient proof in the record of this fact. But if it were proved, we ought not to consider it, for it is unfair to a defendant that he should be called upon at the hearing to answer to a matter which he was not informed by the bill he must prepare for. The complainants ought to have set up the matter of infancy in their bill, if they intended to avail themselves of it.

Another ground of equitable jurisdiction contended for, is the allegation of the bill that these slaves are family servants, and for that reason are of peculiar value to the complainants. What merit there may have been in an allegation of this kind, had the first suit for the negroes been brought in Chancery, it is also unnecessary for us to determine. We do not think it a sufficient ground to authorize a new suit to be brought in equity. If the jurisdiction of a Court of Chancery is concurrent with that of law, for the purpose of ascertaining the title of the slaves, which

was the object of both suits, the complainants should have brought their first suit in chancery, had they intended to rely on such ground. The fact existed at the time the action was brought at law, and was known to the complainants, and it would be unjust and vexatious to a party to cause him to defend two suits, when in one the plaintiff could have availed himself of every thing in his favor. If such a proceeding were allowed, the plea of a former judgment would be of little value, for there is hardly any case in which some new matter might not be alleged. See Saunders et al. vs. Frost, 5 Pick. 275.

Another ground on which the complainants contend that this bill should be entertained, is that the merits were not tried in the suit at law. It appears that on the trial of the action of detinue, when the issue was upon the plea of not guilty, the plaintiffs, with other testimony, introduced the trust deed before mentioned, and the court charged the jury "that on the showing of the plaintiffs, it was not competent for them to recover—that the title exhibited by the plaintiffs was variant from that declared on—that the evidence exhibited, if believed by the jury, shewed the title to be in Wesley Adams, trustee, who was only competent to sue in that form of action—that if there was any title in the heirs of Mary Thornton, it should have been asserted in the name of Wesley Adams, or by bill in equity." We are inclined to think this instruction was erroneous, but as we are not called upon to say whether the action was properly brought, we do not decide that point. We regard the instruction in the same light as charges frequently given by the court to the jury, when it advises them of the force and effect of a fact, if established before them. It was but saying to the jury, if you believe the testimony to be true, then the plaintiffs have failed in making out their case; they have not proved an important fact, a legal estate in

themselves, but have proved one in some one else. Admitting this instruction to have been wrong, and that because of it, the verdict was given for the defendant, was the case tried upon its merits? We think it was. Whenever an issue involving the merits is submitted to the jury, it is a trial on the merits, and a judgment on the verdict in such a case is conclusive against a second suit for the same cause, of action, until it is reversed or set aside. Dane's Abridgement, vol. 6, p. 89, was cited as an authority to show that when the plaintiff had misconceived the form of his action, it should be no bar to a subsequent suit fo the same cause of action. It will be seen by reference to the authorities cited in the Abridgement that they apply when it is made to appear that upon the face of the pleadings in the former suit, the plaintiff had made a mistake in the *manner* of bringing his suit. But the authorities do not support the proposition that when, as here, a case is once submitted to the jury upon an issue involving the merits of the plaintiff's claim, and a judgment is rendered on their verdict, a court of law or equity will allow another suit for the same cause of action and the same purpose, upon the ground that the verdict in the first suit was caused by an erroneous instruction of the court to the jury. A judgment, in such a case, is conclusive until reversed or set aside.—There are cases in which items of an account have been sued on in a second action, when the plaintiff was satisfied that the evidence in the first did not sustain them, but in these cases the items were withdrawn or abandoned before the case went to the jury. In such instances, the abandonment of the items was equivalent to a non-suit or a discontinuance, which are no bar to a new action. There are cases also in the New York Reports in which it appears, according to the practice there, that claims may be allowed upon motion and affidavits, and when they are rejected on such

applications, an action may still be brought for them, and the ground for sustaining the new action is, that decisions upon motion and summary application, which do not admit of great discussion or of being subject to a writ of error, are not final and conclusive so as to amount to a *res judicata,* and a bar to a renewed consideration of the case.—See Arden vs. Patterson, 5 John. Ch. R., 52, Simson vs. Hart, 10 John. R., 63.

In examining the authorities, we have not met with a case which decides that a plaintiff, after having deliberately submitted his claim to a jury on an issue upon the merits, and a judgment rendered on the verdict has not been reversed or set aside, may be permitted to bring a second suit for the same cause of action. If there is such a decision, we think it cannot be sustained upon principle. There are instances in the books in which it was made palpable that justice had not been done in a suit at law, yet a judgment having been deliberately given, and still in force, a Court of Equity refused to relieve. In Stephenson vs. Wilson, 2 Vern. 325, a verdict and judgment went against the defendant on account of a false plea filed by the attorney at law without direction, but the Court of Chancery would not relieve, though the right was never tried at law. In Protherne vs. Forman, 2 Swanst. 231, a judgment by default had been obtained against a defendant, and he brought his bill to be relieved against the judgment. His counsel insisted that when the justice of the cause is clear, and the merits have not been examined at law, nor submitted to the opinions of a jury, equity would relieve, but the Chancellor held that this was not sufficient to authorize a Court of Equity to interfere. In Hunt vs. Terril's heirs, 7 J. J. Marsh, 67, it appeared that the plaintiff, on demurrer to the evidence, failed in the suit at law, because the court thought his evidence not sufficient. He then

filed his bill in equity for the same claim, when the defect in the testimony at law was supplied, and the justice of his case was made clear, but relief was refused.

In this case, as in those to which we have just referred, we think substantial justice has not been done by the suit at law upon the question of the right of complainants to these negroes. We regret that it cannot be done now, but we must be governed by an adherence to principle and a regard for the effect of this decision upon future cases, and not by a wish to relieve against a hardship. Were this suit to be entertained, there is hardly any that has gone off upon a wrong instruction to a jury, for which a second or more suits should not be allowed. The proper course of complainants was, after hearing the opinion of the court as to the effect of the evidence, to have taken a non-suit before the jury retired, or if they considered the view of the court erroneous, to have excepted and appealed. Not having done either, but having persisted in letting the case go to the jury, and having allowed the judgment to stand unreversed, and not having set up in their bill any ground of fraud, mistake or surprise, we must hold the judgment at law conclusive of the rights of the complainants to these negroes.

We may properly apply here the language of the court in Gregory vs. Burral, 2 Ed. Ch. R., 420, where an attempt was made to avoid, by a bill in equity, the decision of a court of law against the plaintiff. "It was made by a court of competent jurisdiction of plaintiff's own choosing, and the form of the action was of such a nature as to let in the whole equity of the plaintiff's case. The right or wrong of the decision is not now in question. If there were error in the judgment, the plaintinff should have sought to correct it elsewhere. It is not the business, nor is it within the province of this court to review it, and while the judgment

remains in force, it is conclusive upon the rights of the parties."

Let the decree of the Circuit Court be affirmed with costs.

GEORGE PERRY, PLAINTIFF IN ERROR, VS. NICHOLAS LEWIS, DEFENDANT IN ERROR.

1. The general principle adopted by civilized nations is, that the nature, validity and interpretation of contracts, are to be governed by the *lex loci* of the country where the contracts are made or to be performed; but the remedies are to be governed by the *lex fori*.
2. That portion of the period of prescription which has run under the limitation laws of another State, cannot be united with the time which has elapsed under the laws of this State, so as to complete a statutory bar of the right of action
3. The rule is that a foreign statue of limitation is inoperative except in cases where it not merely professes to bar the remedy, but goes directly to the extinguishment of the debt, claim, or right.

Writ of Error to the Circuit Court of the Western Circuit for Santa Rosa county.

The facts of the case are contained in the opinion of the court to which reference is made.

G. S. Hawkins, for Plaintiff in Error.

R. L. Campbell, for Defendant in Error.

PEARSON, J., delivered the opinion of the court.

This is an action of Trover brought to recover the value of a slave lost by Lewis, the plaintiff below, in Sumpter county, Alabama, in July, 1844—sold by one Jones, to Henshaw of Covington county, Alabama, on the 11th November, 1844—by Henshaw again sold to Criglar of Santa

Rosa county, Florida, on the 26th June, 1848—and finally sold by Criglar to the present plaintiff in error, Perry, who was the defendant below of the same county and State, on the 26th October, 1849, the plaintiff being ignorant whose possession the slave was in until April, 1851.

Upon demand and refusal of the delivery of the property to plaintiff, action was brought on the 2d June, 1851.

There were several pleas filed by defendant, but the only one relied upon for the defence was the statute of limitations of this State. Upon the trial below, the court was moved to instruct the jury. "That if they were satisfied from the evidence that there was a continued adverse possession of the negro by Henshaw, Criglar and Perry, under their respective bills of sale, part of the time in the State of Alabama, and part of the time in the State of Florida, and that the time during which Henshaw had adverse possession of the negro in Alabama under the sale to him, when connected with the time during which Criglar and Perry successively had adverse possession of him in the State of Florida under the respective sales to them, would, when added together, amount to five years next before the commencement of the suit, then the plaintiff ought not to recover." Which instruction the court refused—the defendant excepted, and the jury having found for the plaintiff, and judgment being rendered accordingly, the defendant's counsel appealed and assigns such refusal as error.

The statutory bar of the action of Trover in Alabama is six years—in this State five years. From the foregoing statement it is apparent that the plaintiff was not barred during the possession of Henshaw in the State of Alabama under and by virtue of the statute of limitations of that State; and it is equally manifest that he was not barred under our statute of limitations by the possessions of Crig-

lar and of the defendant Perry, even if connected together, in this State. While it appears that if the possession of Henshaw in the State of Alabama can be tacked to that of Criglar and Perry in this State, the prescription of our statute would be complete.

The questions therefore presented for our consideration are,

1st. Is the doctrine of tacking possessions admissible in an action of Trover?

2d. If such doctrine is admissible will it apply in a case where one of the possessions relied upon occurred in another State?

1. Upon the first question we express no opinion, because the minds of the court are not fully agreed in relation to it, and a majority of the court are of opinion that a proper solution of the second question is decisive of the case. The principles in regard to tacking possession will be considered when they shall necessarily arise before us.

2. Conceding for the purpose of the present argument that the doctrine of tacking does prevail to some extent, we are met by the second question as to whether a statutory bar can be made out by tacking part of the time which the statute of limitation has run under the statute of another State, to another part which has elapsed under the statute of this State. This question is so well settled upon principle and authority that it scarce requires discussion at this day. It was not made or discussed before us, but must necessarily control this case. Our statutes of limitation, by an amendment enacted in 1846, Thomp. Dig., p. 443, § 2, place non-resident plaintiffs upon the "same footing" with resident citizens of the State. Nor is there any special exceptions from the general law of limitation in behalf of defendants, save those contained in the amendments of 1833 and 1835, Thomp. Dig. p. 445, § 1 and 2, by

which they are permitted in cases where the cause of action arose abroad to plead the statute of limitations of the foreign state or place where it accrued, provided it would be a good bar in such place. This provision is obviously not applicable to a defendant whose liability arose in this State —nor has the defendant sought to obtain its benefit by pleading the prescription of Alabama. The parties then stand simply upon the footing of two citizens of the State litigating a cause of action arising in the State, within the limit of State prescription. For it is manifest the plaintiff had no cause of action against the defendant Perry, previous to his possession of the negro by purchase from Criglar, on the 26th October, 1849, although a right of action had accrued to him in the State of Alabama, as far back as the 11th November, 1844, against Henshaw, who purchased at that time from Jones. This right of action might have been pursued successfully at any time within the statutory period against Henshaw in the State of Alabama, and if neglected until Henshaw's possession ripened into title by the lapse of time in Alabama, then Henshaw's sale to Criglar, would have conferred title, and in like manner Criglar's conveyance to the defendant Perry would have vested the title in him, of which he might have availed himself under the general issue. 5 Clark & F. Rep. 1, 15, 16, 17; 3 Strob. R. 331; Story's Conflict of Laws, §582; 5 Yerger, p. 1. But Henshaw's possession was less than the statutory limitation of Alabama, and therefore conferred no title upon him. There is then no ground of defence for the defendant but in assuming that the statute of Alabama, having commenced to run against Henshaw, would continue to run notwithstanding intervening disabilities, not only in his favor but in favor of those claiming under him, although citizens of a different State. This is a familiar and sound principle of law in its just application, but it can have no

force or effect beyond the jurisdiction of the forum in which it is invoked. It is a principle of the law of prescription, and like that, a part of the *lex fori* and can have no *extra territorial* authority. Judge Story in his work on the Conflict of Laws, sec. 582, says: "It is no answer to say that when once the statute of limitations begins to run, no subsequent impediment stops it from continuing to run. That is true in a nation whose laws contain such provisions or inculcate such a doctrine, but no other nation is bound to give effect to such provisions or to such a doctrine.—They are strictly *intra territorial* regulations and interpretations of the *lex fori,* which other nations are not bound to observe or keep." Had the plaintiff sued Henshaw in the courts of Alabama as regulated by her laws, he might have availed himself of this principle in those forums if necessary to his defence, "but it can have no application in the present case, for the plain reason, that those laws can have no obligatory force out of their own jurisdiction."—Justice Wheeler in Hays vs. Cage, 2 Texas Rep., 507. It is a maxim, says Judge Story, (in his work above quoted,) of international law that "whatever force and obligation the laws of one country have in another, depend solely upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisdiction and polity, and upon its own express or tacit consent." The only authority given to the statute of limitations of Alabama in our courts, is under the laws of 1833 and 1835, before cited, which it has been shown are inapplicable to this case. It has been urged that the principle that the statute of limitations only applies to causes of action subsisting within the State, might give rise to stale demands arising in other States. The argument *ab inconvenienti* is entitled to but little consideration in legal adjudications. We must declare the law as we find it. But we think this very objection

was in the view of the Legislature, and designed to be remedied by the two acts of the General Assembly last cited, securing the right to defendants to plead the statute of limitations of other States in all cases where it would prove a bar in those States. Thus at once tacitly admitting that the law was as we state it, and providing a remedy for the further protection of our citizens from stale foreign demands originating without our jurisdiction. "The general principle by civilized nations is, that the nature, validity, and interpretation of contracts are to be governed by the laws of the country where the contracts are made or are to be performed, but the remedies are to be governed by the laws of the country where the suit is brought, or as it is compendiously expressed by the *lex fori*." 8 Peter's S. C. Rep, 361.

We come then to the final question, whether the period of prescription which has partly run under the laws of another State can be united with the time which has elapsed under the laws of our own State so as to complete a statutory bar. Mr. Justice Story has fully considered this question in his compendious work on the Conflict of Laws, sec. 582, and concludes that it cannot be done except in cases where the foreign statute does not merely profess to bar the remedy, but goes directly to the extinguishment of the "debt, claim, or right." Chancellor Kent is equally clear and decisive on the question in Ruggles vs. Keeler 3 Johns Rep., 261. In Alexander vs. Bennett, 5 Richardson's Law Rep., 189, the Supreme Court of South Carolina have elaborately considered and decided the question in the same way, under circumstances nearly identical with those presented in this case. Town's Executor vs. Bradwell, 1 Stewart & Porter, Ala. Rep. 36, establishes the same principle. And to the same effect are Gautier vs. Franklin, 1 Texas Rep., 732; Hays vs. Cage, 2 Texas Rep.,

501; 1 Caine's Rep., 402; 7 Mass. Rep., 515; 14 Mass. 203; and 13 Missouri Rep., 160. Still further authority might be cited, but we deem the foregoing sufficient to establish the principle upon which this case turns. It is consonant with reason and principles of Justice, that where one of two innocent parties must suffer a loss, it should fall upon him who has been most remiss in securing his rights. Such is the result from the application of the rules of law in this case. No degree of diligence or of caution could have protected the plaintiff against the abduction of his slave, either by kidnapping or by his own volition; wherein the defendant was put upon his guard by the principles of the common law, *caveat emptor* being the rule. It was his duty to have enquired into the character of the title which he purchased, and if a doubt arose of its validity, to have secured himself by a sufficient warranty from the vendor; failing in this, he has acted in his own wrong and cannot justly complain of the assertion of the plaintiff's rights.

Let the judgment of the Circuit Court be affirmed with costs.

DUPONT, J., also delivered the following opinion:

I entirely concur in the judgment of affirmation which has just been pronounced in this cause, but do not concur in either the doctrines contained in the opinion of the majority, nor in the reasoning by which those doctrines are sought to be enforced. Without entering into an argument in reference to the correctness of those doctrines, or of their applicability to the facts of this case, I shall content myself with this brief expression of my *dissent,* and proceed at once to give the ground of my conclusion and the views which I entertain of the whole case.

The only question raised or argued before us at the hearing was whether, in an action of *trover,* a defendant,

in order to complete the bar of the statute of limitation, shall be allowed to avail himself of the time which may have elapsed from the conversion of the property by his immediate vendor and by those under whom he claims, or whether he shall be confined to the date of his own conversion at the point of time from which the running of the statute shall be calculated. In other words, whether the defendant in possession shall be allowed to add to the period of his possession the time that the property may have been in the adverse possession of those under whom he claims title, so as to make out the full statutory bar of five years.

This is a question of much greater difficulty than it would seem to be at the first blush, involving as it does considerations of paramount importance, bearing upon the protection and enjoyment of personal property, whether considered in reference to the rights of the original owner or to those of the *bona fide* purchaser. It is somewhat strange, that in our examination of the English Reports, we have been unable to find a single case bearing immediately upon the question raised in this case. It is true that there are numerous cases involving the question of a *fraudulent concealment* of the property, and also the further question of the *want of knowledge* by the plaintiff of the particular date of the conversion. But these are questions essentially different from the one under discussion, which is the naked right of the defendant to lap the period of his possession upon that of those under whom he claims, so as to make out the full time required for the statutory bar, and therefore afford no light for its elucidation.

The counsel for the appellant cited at the argument Angel on Limitation, 513, to show that in ejectment several adverse possessions, being in privity one with the other,

and all referable to the same entry, might be united or tacked together so as to make up the full time of the statutory bar; and it was contended that in this respect there is no difference between the action of ejectment for the recovery of the possession of land and that of trover for the value of personal property. The doctrine of a continuity of possession, where land is the subject of the suit, seems to be well established in the English courts, and there is but little contrariety of opinion on the subject in our State Courts. The argument of the appellant's counsel is based entirely upon analogy, but I am not satisfied that any analogy really exists. It seems to me that there is a manifest difference in the principles upon which the two actions proceed. In ejectment, the subject-matter of the suit is the possession of the land itself, the damages being unusually only nominal, and the action must be brought against a party in the possession of the premises. Possession is a species of *title*, and, as such, may be transferred by assignment. When one occupant surrenders the *possession* to another, he surrenders his *liability* to answer for the occupancy, and that other assumes it and with it whatever *benefit* may result therefrom. There would seem, then, to be a propriety in allowing the defendant in ejectment to avail himself of all the rights growing out of and the incidents attaching to the thing assigned, viz: the *entry* of the assignor, and that of those under whom he may claim.

The theory upon which the action of trover proceeds, and the philosophy upon which it is based, is quite different from this. The subject-matter of the suit is not the thing itself, but only the *value* of the thing, and the action may be brought against any one who, at any time, may have been guilty of a wrongful conversion, whether he be in or out of possession at the time of the institution of the

suit. It thus appears that "possession" does not enter into the theory of this action. Nothing is predicated thereon. The entire gist of the action is the wrongful *conversion.* Now, a wrongful conversion is a *tort,* and I am aware of no principle upon which a tort can be held to be transferable or assignable. If I be correct in this that a tort is unassignable, (and of this there can be no question,) upon what logical principle can the defendant who is sued avail himself of the benefit growing out of the prior conversion of a former wrong-doer—a benefit growing out of that which was never assigned to him, and which, in fact, is incapable of assignment? Different from the principle governing the asignment of land, when one wrongful possessor of personal property surrenders his possession to another, he does not therewith surrender his *liability,* but he continues to be liable for his own act of conversion, and it would seem, upon just and logical principles, that, as the *liability* continues, any *benefit* growing out of the time of the conversion ought also to remain with him. But the benefit cannot both remain with him and be in another at one and the same time, and yet upon no other hypothesis can the assignee avail himself of the conversion of his assignor. For these reasons I am inclined to the conclusion that the analogy contended for by the counsel for the appellant does not exist.

But it may be said that my argument is based upon technicalities. This is doubtless true to some extent, but it does not therefore weaken it. Technicalities may be legitimately invoked whenever the use of them is intended to subserve a legitimate purpose, viz: the elucidation of truth; and I am greatly in error if any argument upon the distinctive characteristics of the various actions can be framed without in some measure resorting to technicalities.

But, aside from the reasons growing out of the distinctive characters of the two actions, there are considerations of stern justice and enlightened policy, based upon the peculiar nature of the two kinds of property which peremptorily demand that the mode of applying the statute of limitation should be different when sought to be applied to suits in which the one or the other is involved. Land is of a permanent and fixed nature. It has no *locomotion*, nor can it be stolen and secreted or carried away by any one. Its particular location is always presumed to be known to its rightful owner, and if any entry be effected thereon, the act is always open to detection, and the perpetrator of the wrong is unconcealed. If, therefore, a stranger should enter upon land, and after remaining in possession for a time, should convey his possession to a *bona fide* purchaser, and he to another, and so on through any number of assignments, and eventually the mere naked possession shall ripen into a statutory title which shall be paramount to the title of the original and true owner, and thereby deprive him of his property, he ought not to be permitted to complain as against a *bona fide* purchaser in possession; for the injury is the legitimate result of his own wilful negligence. By proper care and vigilance on his part, he may always protect his real property from the unlawful entry of other persons, and even if made, he may readily arrest the operation of the statute by the timely institution of a suit, the party to be sued being always known. As between one so culpably negligent of his rights and one purchasing for a full consideration and without notice, when the question of loss arises, there would seem to be no room for doubt. Not so, however, with regard to personal property. It has no fixed or permanent locality—it is the subject of larceny—it may be stolen and carried beyond the reach or knowledge of the rightful

reasons upon which it is based. In our researches among the American reports, we have found one case in which the point under discussion was expressly ruled the other way. I allude to the case of Smith's Adm'rs vs. Newby, 13 Missouri R. 159. The decision in this case is predicated upon what I conceive to be a strained construction of the statute, and therefore inconclusive upon the point.

The particular phraseology of the statute is invoked by the advocates of either side of the question under discussion as an argument in support of their respective hypotheses. By the one, it is insisted that the words of the statute create a general inhibition referable to the right of the plaintiff exclusively, and that it is not at all applicable to the right of the defendant, that the statute begins to run from the first moment when a cause of action in reference to the thing in controversy arises against any one whomsoever, and that its running is not confined to the cause of action counted upon in the particular suit. By the other, it is insisted that the words of the statute limit its operation to the particular cause counted upon, and that it is not allowable to link the possession of the vendor to that of the vendee so as to complete the full statutory period. The advocates of these two hypotheses insist upon applying their respective constructions of the statute to every case, regardless alike of the *nature* of the thing which constitutes the subject-matter of the suit, and the distinctive characteristics of the action to be brought for its recovery. It is to this want of discrimination that we may attribute the wide difference of opinion that exists upon a question of every day occurrence. It is said, however, in some of the reported cases, that to discriminate in the application of the statute as I have intimated, would be to affix to it *qualifications and limitations* never contemplated by the Legislature. This is mere assumption and the result of a want of reflection, for there

is nothing better understood in jurisprudence, than that in the application of many of the ordinary principles of law they are subjected to material modifications when applied to the one or the other of the two great classes of estates. If this be so with reference to the ordinary principles of law, why may it not equally obtain in the application to statutes?

The result of this argument is, that in an action of Trover, where the statute of limitation had fully run in favor of the vendor, the sale to the defendant sued confers a *title* to the property in controversy, paramount to that of the original owner, and that the defendant may protect himself by a plea of *title,* and is not put to the plea of the statute. But that where the statutory bar was not complete at the date of the transfer to the defendant, he will not be allowed, under a plea of the statute, to link the period of his possession to that of those under whom he claims, so as to make out the time prescribed by the statute, within which the suit is to be brought.

Applying these conclusions to the case before us, it will be readily perceived that I am of the opinion that the Judge of the Circuit Court did not err in refusing to give the instruction prayed for, which constitutes the only error complained of.

JOHN MCDOUGALL, ADMINISTRATOR, &C., OF JOSEPH W. LEA, DECEASED, ET AL., APPELLANTS, VS. RICHARD VAN BRUNT, APPELLEE.

Where a defendant, who is sued in equity by an administrator for the recovery of a slave alleged to belong to the estate of his intestate, sets up an absolute title to the same and relies upon a bill of sale from the intestate directly to himself to support his claim, if the other evidence in the cause shows that the slave was in posession of the interest at the time of his death, and had so continued from the date of the bill of sale, and that a stranger took possession of her immediately after that event, and there is no evidence to negative the idea that the defendant obtained his possession from such stranger, the acts and declarations of the latter, so far as they are immediately connected with his possession, may be admitted as evidence with respect to the character of the defendant's title.

Appeal from a decree of the Circuit Court for Leon county, sitting in chancery.

Complainants filed their bill, alleging that some time in March, 1845, Joseph W. Lea, dec'd, borrowed of Richard Van Brunt, senior, the father of defendant, two hundred and fifty dollars, for which he gave his promissory note payable to Richard Van Brunt, Sr., one day after date, and at the same time gave a bill of sale for a certain slave named Maria as a security for said note, and for no other purpose; that Joseph W. Lea, the intestate, retained the possession of said slave until his death, which occurred in the latter part of the year 1846, or early in 1847; that Richard Van Brunt, Sr., about two or three years after the death of Joseph W. Lea, came to the place where said Lea resided and took possession of said slave and removed her from the premises of said Lea, alleging at the time that he

held a bill of sale for her, executed by said Lea to secure the money loaned as aforesaid.

The bill further alleges, that the note given by Lea was endorsed by Van Brunt, Sr., in blank to the defendant, who afterwards endorsed the same to Lloyd & Flagg, and that the note has since been paid off and satisfied in full by McDougall, administrator; that defendant obtained the possession of the slave from his father, Richard Van Brunt, Sr., under color of the bill of sale aforesaid; that at the date of the bill of sale defendant was a minor, a member of his father's family; that Richard Van Brunt, Sr., since the slave was taken possession of as aforesaid, has died. The prayer is in substance that the bill of sale aforesaid be declared a mortgage; that the debt to secure which it was given be declared to have been paid, and that the defendant be decreed to surrender the slave to McDougall, as administrator of the estate of Lea.

The answer denies that defendant obtained his possession from Richard Van Brunt, senior his father,, or that the bill of sale referred to was intended to operate as a mortgage, and expressly avers that defendant bought the slave from Lea for two hundred and fifty dollars, which he paid in cash and received at the time of the possession of the slave, which he has ever since retained.

Thomas W. Terrill, a witness examined for complainants, testified that the slave in controversy was at the house of Joseph W. Lea at the time of his death, and had been for some time previously; that she was in Lea's possession for months before his death, and that he saw her at Lea's residence the day after his decease; that defendant, in 1846, was about twenty years of age, and that he was then living with his father; that he was present when a conversation passed between Alsa Strickland and Richard Van Brunt, Sr., at the house of Lea, the day after his death. Van Brunt, Sr., said he had loaned Lea two hun-

dred and fifty dollars, for which he had his note and a bill of sale to the negro girl in question to secure him in the payment of the note, and offered the note, bill of sale and negro to Strickland if he would return to him the money he had loaned to Lea.

Alsa Strickland, another witness examined for complainants, testified that the slave in question was in Lea's possession until his death; that Richard Van Brunt, Sr., took possession of said slave after Lea's death; that he, Van Brunt, told witness that he held a bill of sale for said slave, as security for money loaned Lea; that Van Brunt, Sr., offered to give him the slave and all the papers if he would pay the money loaned, viz: two hundred and fifty dollars. Van Brunt, Sr., at the same time offered to warrant the title. On the day Joseph. Lea died, witness requested Van Brunt, Sr., to administer on Lea's estate; that he declined, stating that he held a note and bill of sale to the girl to secure him in the payment of the money borrowd by Lea.

Gillen B. Strickland, another witness examined for complainants, testified that the slave in controversy remained in Lea's possession until his death; that shortly after Lea's death, witness being present, Van Brunt, Sr., took possession of the slave, declaring he had a bill of sale for her as security for money loaned to Lea. Van Brunt, Sr., afterwards offered the slave to the sister of witness on payment of the money loaned.

For the defendants, Charles W. Martin was examined, who testified that he knew the slave Maria enquired of; that he knew her in the spring of 1846; she was then a small child, three or four years of age. Her value then was about two hundred dollars. She was in Mr. Lea's possession when he first knew her. She remained in his possession until his death.

James C. Van Brunt, a brother of defendant, was examined in his behalf. He states that he knew defendant purchased the slave from Joseph W. Lea some time in the spring of 1846; that his mother, himself and some of the children were present at the time of the purchase. He saw money paid—thinks two hundred and fifty dollars. The slave was small. She was at Lea's house until his death. At the time of the purchase does not think that any writing passed—saw none. The witness states that his father and family, consisting of eight children, lived with his brother, who was then 20 or 21 years of age and unmarried, and that his brother had been attending to the business of the farm, part of the time overseeing.

The defendant offered and read in support of his title an absolute bill of sale from Lea to himself, purporting to have been executed shortly before Lea's death. This bill of sale is admitted to be in the hand writing of Van Brunt, Sr., who is the only subscribing witness thereon.

The court below ruled out so much of the depositions of the witnesses as referred to the acts and declarations of Van Brunt, Sr., on the occasion of his taking possession of the slave after the death of Lea, as inadmissable to defeat the title set up by the defendant, and dismissed the bill.

Archer & Papy for Appellants.

D. P. Hogue and B. F. Allen, for Appellee.

DuPONT, J., delivered the opinion of the court.

This is a suit in equity, instituted by the appellant, as the administrator on the estate of Joseph W. Lea, deceased, and others, for the recovery of a negro slave alleged to be the property of the said estate.

The bill alleges that the intestate, Lea, about the month of March, A. D., 1845, borrowed of Richard Van Brunt,

Sr., the sum of two hundred and fifty dollars, for which he gave his promissory note, and at the same time executed and delivered to him a bill of sale for the negro in controversy, which was intended and designed to operate only as a mortgage to secure the payment of the said note.—That in the latter part of the year 1846, or early in the year 1847, the said intestate departed this life, being then in possession of the slave, and never having parted with the same. That two or three days after the decease of the intestate, Van Brunt, Sr., came to the late residence of the intestate, and took the slave into his possession, alleging at the time that he held a bill of sale for her, to secure the before mentioned loan of money. That the note given for the loan of money was made payable to Van Brunt, Sr., who indorsed the same in blank to the defendant, who afterwards indorsed and transferred the same to Messrs. Lloyd & Flagg, and that the note has since been paid off and fully satisfied. That Van Brunt, Jr., the defendant, obtained the possession of the slave from his father, Van Brunt, Sr., under color of the bill of sale before referred to. That the defendant was at the date of the bill of sale, a minor and a member of his father's family, and that Van Brunt, Sr., has since died. The substance of the prayer is, that the mortgage debt be declared to have been paid, and that the defendant be decreed to surrender the slave to the plaintiff as administrator of the estate.

The defendant in his answer denies that he obtained his possession from his father, or that the bill of sale under which he claims title to the slave was intended to operate as a mortgage, and expressly avers that he, defendant, bought the slave from Lea for the sum of two hundred and fifty dollars, which he paid to him in cash, and received from him at the time of the purchase the possession of the slave, which he has retained to the present time.

At the hearing before the Chancellor, the depositions of several witnesses were proposed to be read going to show that the slave was in the possession of Lea at the date of his decease, and that she was taken possession of by Van Brunt, Sr., who declared at the time that he held a bill of sale for her from the intestate, to secure the payment of a note of two hundred and fifty dollars, which he had given to him for that amount of money loaned to him prior to his decease.—These several depositions were read as proofs in the cause, with the exception of so much thereof as referred to the acts and declarations of Van Brunt, Sr., upon the occasion of his taking possession of the slave, after the decease of the intestate; which acts and declarations were excluded as being inadmissable to defeat the alleged absolute title of the defendant. The defendant exhibited in support of his title an absolute bill of sale from the intestate Lea directly to himself, purporting to have been executed a short time prior to his decease.

The petition of appeal alleges two grounds for the reversal of the decree of the Chancellor. 1st. That the court erred in excluding the acts and declarations of the elder Van Brunt from the evidence in the cause. 2d. That upon the pleadings and testimony, (with or without the declarations of Van Brunt,) the cause should have been decided for the complainants.

The first assignment as set forth in the petition is based upon the assumption that the acts and declarations of the elder Van Brunt, as testified to by the witnesses, were a part of the *res gestae,* and as such were admissable to establish the point at issue, to wit: the character of the defendant's title under the bill of sale—whether absolute or only a security in the nature of a mortgage.

It was insisted on the part of the appellee, that his title to the slave in controversy could not be affected by the acts

and declarations of his father, who was an entire stranger to, and wholly unconnected with the alleged purchase from Lea. It is undoubtedly correct as a rule of evidence that no one can be held to be responsible for, or bound by the acts or declarations of a mere stranger; and if that were the position of the elder Van Brunt in reference to the alleged title to the slave, we should have no difficulty in sustaining the action of the Chancellor in ruling out from the evidence his acts and declarations. But we are clearly of opinion that these acts and declarations are intimately connected with the title of the defendant, which he seeks to set up under color of the bill of sale from Lea; and, being so connected, there is a manifest propriety in allowing them to have their proper weight in determining the rights of the parties. The correctness of this conclusion will be readily perceived if we advert to the other evidence in the cause. It is distinctly proved by the testimony of several of the witnesses, whose depositions are before us, that the slave in controversy was in possession of Lea at the time of his decease, and remained at his late residence with his other slaves, until she was taken possession of and removed by the elder Van Brunt, a few days after the decease of the intestate under a claim of title. Thomas W. Terrell, one of the witnesses examined, testifies that the slave was at the house of intestate at the time of his death, and had been there for some time previous to that event. In another part of his deposition he says, "the above described negro girl was in the possession of Joseph W. Lea for months before his death." He also testifies that he saw her at the residence of the intestate the day after his decease.

The depositions of Alsey Strickland and Gillen B. Strickland, are likewise to the same effect, all going to show that the slave was in the possession of the intestate at the date

of his decease, and that she remained at his residence until she was afterwards taken possession of by the elder Van Brunt under a claim for security for money loaned, and removed by him to his residence. These witnesses are also sustained in their evidence by the deposition of Charles W. Martin, a witness examined on behalf of the *defendant,* who says—"I know the girl Maria enquired of—I knew her in the Spring of 1846. She was then a small child about 3 or 4 years of age. Her value then was about $200. She was in Mr. Lea's posession when I first knew her.—*She remained in Mr. Lea's possession until his death.*"

Now, the evidence contained in the depositions just referred to, shows conclusively, and freed from a shadow of doubt, that down to the period of Lee's death, he had always had the possession of the slave—that the possession had been *continuous and uninterrupted,* (with the exception of the time that she was in the possession of Vickers under a pledge,) and that it was never changed until she was taken possession of by the elder Van Brunt. Here then the first change of possession that we have any knowl edge of, is the change effected by the elder Van Brunt under a claim of title. The next change that we hear of, is the assertion of the claim of the defendant under color of a bill of sale from the intestate. It is very manifest from the evidence before referred to, that (notwithstanding the allegation in the answer,) he, the defendant, never obtained the posession of the property from the intestate Lea. And the clear presumption is, in the absence of proof to the contrary, that his present possession was obtained from his father, the elder Van Brunt, and from no one else. If we be correct in this conclusion, and it would seem not to admit of a doubt, then it results conclusively that the possession of the defendant is intimately connected with the possession of his father, and that the father and son stand in

full *privity* respecting the title to the slave in controversy. If this be so, it cannot assuredly be said that the acts and declarations of the elder Van Brunt, touching the manner of acquiring his possession of the slave, and his object and motive for the acquisition, are those of a mere stranger, and are to be excluded from the evidence as being *res inter alios acta.*

It is, moreover, worthy of consideration, in determining upon the admissability of this evidence, that the defendant is proven to have been a minor at the date of the bill of sale under which he sets up his title to the slave, and was residing with his father, as a member of his family; that the bill of sale is admitted to be in the handwriting of the father, and that he is the only attesting witness to the execution of the same. The note also which it is alleged was given for the loan of money is shown to have been endorsed to the son, and affords strong circumstantial evidence to connect him with that transaction. These circumstances, we think, go far to show that the aspect of the transaction, as it really took place, may be very different from that presented by a mere reference to the bill of sale, and ought, therefore, to exercise a proper influence in determining not only the admissability of the evidence, but the true character of the entire transaction.

We have considered this question without reference to authorities, as it involves a simple elementary principle about which there is no dispute. The only difficulty encountered is in its application, and upon that point the books furnish but an uncertain guide. It may not, however, be out of place to note the rule of evidence upon the subject of fraud as observed in the courts of law and equity respectively. Mr. Story, in his Treatise on Equity Jurisprudence, remarks, that "Courts of equity do not restrict themselves by the same rigid rules as courts of law

o, in the investigation of fraud, and in the evidence and roofs required to establish it. It is equally a rule in ourts of law and courts of equity, that fraud is not to be resumed, but it must be established by proofs. Circumtances of mere suspicion, leading to no certain results, ill not, in either of these courts, be deemed a sufficient round to establish fraud. On the other hand, neither of hese courts insists upon positive and express proofs of raud; but each deduces them from circumstances affordng strong presumptions. But courts of equity will act pon circumstances, as presumptions of fraud, where courts f law would not deem them satisfactory proofs." (Story's Eq. Ju., § 190.)

From the view which we have taken of the first assignnent contained in the petition of appeal, and from the onclusion to which we have been lead, we deem it unneessary to investigate the other ground alleged for a reveral of the decree of the Chancellor, which would involve a ull discussion of the merits of the cause. As the case nust necessarily be sent back for further proceedings, ven were we to decide upon the merits, it is better to reerve that investigation until there shall have been a full earing upon the new trial to be granted.

Let the decree of the Chancellor be reversed, with costs, nd the case be remanded to the court below, with direcions to reinstate and rehear the same as upon a new trial, nd otherwise to proceed in said cause in accordance with he views herein expressed.

BALTZELL, C. J., delivered the following opinion:

I concur in the view taken by the court in this case, but hink that they should have gone further and disposed of t finally. There is no reason, so far as I can see, why the ase should not be so disposed of. I see nothing to preent a final decision on the merits in this court in the pre-

sent aspect of the record. There is no pretence of any new testimony—no application is made for a rehearing or new trial. Why, then, is the case remitted for new trial to the court below?

JESSE CROWELL AND WILLIAM H. DAUGHTRY, PLAINTIFFS IN ERROR, VS. EBENEZER M. SKIPPER, DEFENDANT IN ERROR.

1. The law of the place where a contract is made is, generally speaking, the law by which the contract is to be expounded, but it is nevertheless, the right of this government to prescribe rules and regulations for the protection and enjoyment of all property which shall be brought within its territorial jurisdiction.
2. The 3rd Section of the Act of 1823, with reference to fraudulent conveyances (Thomp. Dig., 217, c, 11, §1,) requires, that where the *possession* of personal property is in one person and the *use* in another, in order to protect it against liability for the debts or contracts for the person in possession, the deed by which it is held must be recorded within five years. Whether or not this section is applicable to contracts made out of this State. Quere?

This is a writ of error sued out by plaintiffs in error to reverse a judgment of Jackson Circuit Court. [As the opinion of the court embraces a statement of the facts presented by the record, the reporter thinks it would but encumber the reports to make out a statement of his own, and hence he refers to the opinion for the facts of the case.]

James F. McClellan, for Pltffs. in Error.

A. H. Bush, for Deft. in Error.

DU PONT, J., delivered the opinion of the court.

The record presents the following state of the case. On the 15th day of January, A. D., 1852, the defendant in error

recovered a judgment against Bennet Whidden in the superior court of Decatur county, in the State of Georgia, for the sum of $143.64, principal, and $20.41, interest. He afterwards brought suit on said judgment in the circuit court of Jackson county, in this State, and recovered a judment thereon on the 6th day of May, 1853, upon which a writ of fi. fa. was issued and levied upon the property in controversy, viz: negro boy Patrick. The plaintiffs in error interposed a claim to the property as trustees under a deed of marriage settlement for Mary Jane Whidden, the wife of the defendant in execution. The claim was tried in the court below, (a jury having been waived,) and the judgment was against the claimants, and to reverse that judgment, this writ of error is brought.

To support their title to the property, the claimants introduced two deeds in writing—the one purporting to be an antenuptial agreement, by which the defendant in execution, in consideration of a marriage to be consummated with Mary Jane Daughtry, agreed to settle upon her all the property to which she might become entitled. This deed is dated on the 1st day of December, 1848. The other purports to be a conveyance of the property to the plaintiffs in error, as trustees for the separate use and benefit of the wife, and is dated on the 31st day of January, 1850.—Both of these deeds purport to have been executed in Decatur county, State of Georgia, the then residence of the parties, and the *rei sitae* of the property, and to have been registered in the office of records for said county on the 20th day of February, 1850.

[The consideration of the deed of settlement is stated to be "a marriage already had and solemnized," and at the time of its execution, the property therein conveyed, was in the hands of the administrator of the estate of the father of Mary Jane Whidden, and not reduced into possession

by her husband. Both deeds were "filed for record and recorded the 6th of August, 1852," in Jackson county, in this State.]

The first question that arises for our consideration is with respect to the validity of these deeds in the State of Georgia, where they were executed, and how far they protected the separate estate of the wife, under the laws of that State, while the property remained in that jurisdiction.

It is insisted by the counsel for the defendant in error, that the antenuptial agreement is void for the reason that it was not recorded within three months after its execution, in accordance with the requisition of the laws of the State of Georgia, and we are referred to the statute on the subject. It is unnecessary to enquire into the validity or invalidity of the antenuptial agreement, inasmuch as there is an absolute conveyance of the property in the deed of marriage settlement above referred to. This latter deed does not (as is assumed by the counsel) purport to have been executed "in pursuance" of the agreement; the consideration of the deed is stated to be "a marriage already had and solemnized." But, even if it had in fact purported to have been made in pursuance of the agreement, and, from some want of formality, the agreement had been rendered void, we do not see that this could in the slightest degree have affected the validity of the instrument. The making of the deed of settlement was an act highly proper in itself, and the consideration of a consummated marriage was sufficient to sustain it as a valid instrument. Circumstanced as this property was, it being still in the hands of the administrator and not reduced to possession by the husband prior to the date of the trust deed, if it had been necessary to resort to a court of equity to obtain the possession from the administrator, the chancellor in

his decree would, upon an intimation to that effect, have ordered a suitable provision to be made for the separate use of the wife. The trust deed stands upon its own foundation, a marriage consummated, and did not require the support of the antenuptial agreement.

It seems to be admitted on all sides, that the validity of marriage settlements, as *inter partes,* is recognized by the laws of Georgia, and that when the deed of settlement has been properly executed and recorded, it will protect the separate estate of the wife, situated in that jurisdiction, against any liability for the debts and contracts of the husband. Seeing, then, that this was a legal and valid contract under the law of Georgia, and that the property, while it remained in the State, was protected by the deed of trust, the next question that arises is as to the effect produced upon the rights of the parties by a removal of the property into this State. That effect depends entirely upon our local law, for it is the unquestionable right of every government to prescribe rules and regulations for the protection and enjoyment of all property which shall be brought by any one within its territorial jurisdiction. Nor is the practical enforcement of that right at all in conflict with the well settled doctrine that the operative effect of a contract, when not illegal or prohibited by the law of the *forum,* is to be determined by the *lex loci contractus.* Chief Justice Marshall, in the case of Harrison vs. Sterry, (5 Cranch R., 189,) has laid down the doctrine with his usual force and simplicity. His language was: "The law of the place where a contract is made is, generally speaking, the law of the contract, i. e. it is the law by which the contract is expounded. But the right of priority forms no part of the contract. It is extrinsic and rather a personal privilege, dependent on the law of the place where the property lies and where the court sits which is to decide the cause."

Mr. Story quotes Huberus to this point, and announces the doctrine thus: "Foreign contracts are to have their full effect here, provided they do not prejudice the rights of our own country or its citizens.—(Story's Con. Laws, § 324.)

He puts several cases to illustrate the rule: "By the Roman law and the law of Freizeland, an express hypothecation of moveable property, oldest in date, is entitled to a preference or priority even against a third possessor. But it is not so amongst the Batavians, and, therefore, if upon such an hypothecation the party brings a suit in Holland against such third possessor, his suit will be rejected, because the right of such third possessor cannot be taken away by the law of a foreign country."—*Ib.*

He also puts another case: "In Holland, if a marriage contract is privately or secretly made, stipulating that the wife shall not be liable for debts contracted solely by the husband, it is valid notwithstanding it is to the prejudice of subsequent creditors. But, in Friezeland, such a contract is not valid unless published, nor would the ignorance of the parties be an excuse according to the Roman law and equity. If the husband should contract debts in Friezeland, on a suit there, the wife would be held liable for a moiety thereof to the Friezian creditors, and could not defend herself under her private dotal contract; for the creditors might reply that such a private dotal contract had no effect in Friezeland, because it was not published." *Ib.*, § 325.

Story also quotes Mr. Burge to the same point, and says: "The law of a foreign country is admitted in order that the contract may receive the effect which the parties to it intended. No State, however, is bound to admit a foreign law, even, for this purpose, when that law would contravene its own positive laws, institutions or policy,

which prohibit such a contract, or when it would prejudice the rights of its own subjects." *Ib.*, 327.

Mr. Chancellor Kent expresses the principle thus: "When the *lex loci contractus* and the *lex fori*, as to conflicting rights acquired in each, come in direct collision, the comity of nations must yield to the positive law of the land."—2 Kent's Com., 461.

In the case of the Ohio Insurance Co. vs. Edmondson, 5 Louis R., 295, the enforcement of foreign contracts was very elaborately and ably discussed by Mr. Justice Porter, who came to the conclusion "that the contract to which aid is required, should not, either in itself, or in the means used to give it effect, work an injury to the inhabitants of the country where it is attempted to be enforced."

These citations are abundant to show, that it is the right of every government to prescribe the rules and regulations by which rights of property springing out of a foreign contract may be enjoyed and shall be controlled, after and so soon as the particular property shall be brought within its territorial jurisdiction. And if the government do no more than to place the enjoyment and protection of such property upon the same and equal footing with the rights of resident citizens, there assuredly can exist no just ground for complaint. This brings us then to enquire, what would have been necessary to be done in respect to a marriage settlement made and executed in this State, so as to protect the separate estate of the wife against liability for the debts and contracts of the husband. By the third section of the act of 1823, usually denominated the "Statute of Frauds," it is enacted that, "where any loan of goods and chattels shall be pretended to have been made to any person, with whom, or those claiming under him, possession shall have remained for the space of five years, without demand made and pursued by due process of law, on the part of the pre-

tended leader—or where any reservation or limitation shall be pretended to have been made, or a use or property by way of condition, reversion, remainder or otherwise, in goods and chattels, the possession whereof shall have remained in another as aforesaid, the same shall be taken as to the creditors and purchasers of the persons aforesaid, so remaining in possession, to be fraudulent within this act and that the absolute property is with the possessor, unless such loan, reservation or limitation of use or property were declared by will or deed in writing, proved and recorded as aforesaid." It is proper to remark that in the two preceding sections of this act of 1823, as published in the pamphlet laws of that year, nothing is said of *proving* or *recording,* and therefore, the words "as aforesaid" occurring in the close of the said 3d section, would seem to be senseless and wholly nugatory, there being nothing to which they may be made to refer. This was doubtless the effect of inadvertence on the part of the Legislative Council, for in looking to the laws passed at the first session in 1822, it will be seen that this section as enacted in the act of 1823, constituted the 3d section of the act of 1822, which was passed with reference to "Fraudulent Conveyances." The act of 1822, contained, as does the act of 1823, three sections, and the section of that act did contain a clause in reference to the mode and manner of proving and recording certain conveyances, and the reference embraced in the third section manifestly was applicable to that clause.—In the re-enactment of 1823, this particular clause was omitted, and consequently the words "as aforesaid" contained in the 3d section of that act, are left without any particular application. It does not follow, however,, that the act of *proving* and *recording* as required by the statute is to be dispensed with, and the act thus become nugatory. We are rather inclined to decide, that the proving and re-

cording under this section must conform to the mode prescribed in the statute which provides for the registry of deeds or bills of sale of personal property.

Having thus briefly traced the history of the 3d section of the Act of 1823, (Thompson's Digest,) the question recurs, how is the separate estate of the wife to be protected against liability for the debts and contracts of the husband, when the deed of settlement is made in this State? The answer is obvious—it must be recorded in compliance with the requisitions of that section. Five years is the time prescribed, after which the property is to be deemed to be the property of the possessor so as to render it liable for his debts and contracts, and, in order to protect it, the deed of conveyance must be properly recorded within that time.—If such a case does not come under this section then there is no law on the statute book which requires a deed of this kind, embracing personal property, to be recorded, and being good at common law between the parties, it would be equally good against creditors of the husband.

In the case before us, the deed of settlement purports to have been recorded in Jackson county, in this State, the present domicile of the husband and the *rei sitae* of the property. But, it is objected that the act of recording is invalid to any person whatsoever, and as especially as constructive notice, because the certificate of the clerk, which is endorsed upon the original deed, does not state that it was either acknowledged by the parties or proved by a subscribing witness. It is unnecessary to decide this question, for the reason that the statutory prescription of five years has not yet elapsed since the property was brought within the limits of this State, and that defect (if it be one) may yet be remedied. For the same reason, we decline to determine whether the section before referred to will apply to a contract made in another State, or whether it is

exclusively confined to contracts originating in this State. Upon this question there is a difference of opinion in the court, and its determination being unnecessary to the decision of this case, we have deemed it best to withhold an expression of our views until the point shall arise.

Let the judgment be reversed with costs.

BALTZELL, C. J., delivered the following opinion:

I am greatly mistaken if the decision in the case of the Bank of the United States against Elizabeth Lee and others, decided by the Supreme Court of the United States, should not be held as conclusive in this case. A deed of trust was made in Virginia, conveying property, slaves, &c., in trust for a married woman, properly recorded there, held by the husband and wife and subsequently taken to the District of Columbia, in Maryland, where the same possession and holding continued, and where the husband became largely indebted. It was contended on the part of a creditor in the new residence that the deed, not having been recorded in the District, was void as against creditors, &c. The court held that it was not; that the statute of Maryland, declaring that "no goods and chattels whereof the vendor shall remain in possession shall pass, alter or change, or any property thereof be transferred to any purchaser, &c., unless the same be by writing and acknowledged before a justice of the peace where such seller shall reside, and be within twenty days, recorded in the records of the same county," had no application.

"The statute," says the court, "has no reference to a case where the title has been vested by the laws of another State, but operates only on sales, mortgages and gifts made in Maryland." They take notice of the apparent ownership of the husband and the silence and acquiescence of the wife, and yet maintain her interest. In support

of their decision, they refer to a case decided by the court of appeals in Maryland, (Smith vs. Bruce, 3 Harris & John,) a case in Tennessee, of Crenshaw vs. Anthony, decided by the Supreme Court of that State—Martin & Geiger, Rep., 110-13; Peters' Rep., 118.

In a very recent case, that of DeLaney Moore, decided in 1852, the same question came before the same enlightened tribunal. "It has been made a ground of defence in the answer in the court below, and it has also been insisted on in argument here, that, admitting the antenuptial contract to have been recorded in South Carolina, and, in consequence thereof, to have been so operative as to affect with notice, creditors and purchasers within that State, yet, that upon the removal of the parties, carrying with them the property into another State or jurisdiction, the inference of the contract for the protection of property would be wholly destroyed, and the subject attempted to be secured would be open to claims by creditors or purchasers subsequently coming into existence. The position here advanced is not now assumed for the first time in argument in this court. The case of the U. States Bank vs. Lee, &c., brought up directly for the examination of this court the effect of a judgment and execution obtained by a subsequent creditor in the District of Columbia upon property found within that District, but which had been settled upon the wife of a debtor by a deed executed and recorded in Virginia, according to the laws of that State, the husband and wife being at the time of making the instrument inhabitants of the State of Virginia. The court came *unhesitatingly and clearly* to the conclusion that the deed of settlement recited and recorded in favor of Mrs. Lea, protected her rights in the subject settled, against the judgment of the subsequent creditor in the District of Columbia. We should not be disposed to disturb

the doctrine laid down in the case of the U. S. Bank vs. Lee, and in the decisions of the State Courts of Tennessee and Maryland above mentioned, *if the rights of the parties turned upon the operation of the contract as constituting notice, or upon proof of the knowledge on the part of Goree, the purchaser, of the existence of the marriage contract.*" 14 How. S. C. Rep., 267.

The language of the Supreme Court of Mississippi, in the case of Hundley vs. Mount, seems also appropriate. "The registry laws of the several States do not operate extra-territorially, nor do those of one State operate upon conveyances executed in another, unless *express words* to that effect be inserted in the statute." 8 Sm. & Mar., 399.

The case under consideration does not require cases so strong as either of these. Here is no debt contracted after the removal to Florida. The deed of trust and the debt were both either executed in Georgia or with reference to its laws, as the parties contracting the debt lived there, and the property was there at the time of its creation.

There is another authority worthy of attention, being an admirably reasoned, and happily expressed opinion of the Supreme Court of New Hampshire, as to the effect of a mortgage made in one State—Massachusetts—attempted to be set aside at the instance of a creditor in another State New Hampshire. The objection was to the want of knowledge of the mortgage of record in the new residence. The court hold that there was no forfeiture of the mortgage interest by the removal, and that the general laws of the State requiring such instruments to be recorded, had no application to a conveyance executed abroad when the parties and property were both out of the State: Offut vs. Flagg, 10 New Hampshire, 46.

For these reasons and not for those given in the opinion just delivered, I am in favor of the reversal of the judgment below.

JOE, A PERSON OF COLOR, VS. THE STATE.

1. In case of a charge of poisoning, chemical tests and analysis of the contents of the stomach and bowels are essential to the ascertainment of the truth, and should be resorted to in all cases where there is no direct proof of the act.
2. Symptoms of themselves, without other circumstances, are not reliable, and cannot be regarded as conclusive evidence of guilt.
3. A new trial will be granted where there is evidence of symptoms alone, and those imperfect, no tests to ascertain the presence of poison, none discovered or traced to the prisoner and motive or other fact proved to induce the presumption of guilt.

Appeal from Leon Circuit Court.

Joe, the Appellant was indicted for administering to a female slave named Rebecca, white arsenic or poison.

The prisoner pleaded not guilty, and on the trial the woman, Rebecca was examined on the part of the State who testified that whilst she was cooking breakfast at a fire out of doors at which prisoner was also cooking, he the prisoner handed her a small breakfast plate containing some beef haslet which he had been cooking and asked her to eat some. She eat about six mouthfuls of it, and immediately afterwards felt a pain in the heart. She also felt as if she was going to vomit, but could not then—but felt as if she was going to die. She commenced vomiting about eleven o'clock—was blind when the "misery was on."—She had great pain in the breast, then all over. She had painful and bloody discharges from the bowels the same day that she eat the food handed her by the prisoner. She was friendly with the prisoner. Had not been sick before.

Dr. Miles Nash was also examined for the State, who testified that he was called in as a physician to see Rebecca on the second day after she had taken something. Des-

cribes the situation of the patient—frequent vomiting and discharges from the bowels, both tinged with blood—legs partially paralized—great tenderness about the stomach. Witness is of opinion that these effects were produced by taking arsenic into the stomach. The case exhibited specific symptoms of disease produced by arsenic. Innocent medicines could not produce such effects. There were no analytical or chemical tests applied to ascertain the presence of arsenic. There are some symptoms produced by aresnic that may be found in other cases where the disease proceeds from other causes.

The prisoner offered several witnesses to testify to his former good disposition.

A verdict of guilty having been rendered, the prisoner by his counsel applied for a new trial on the following grounds, viz: First that the verdict was based upon vague and inconclusive evidence as to the nature and quality, as well as to the administration of the substance or thing alleged to be poisonous; the insufficiency consisting in a want of any analytical or chemical tests applied for the purpose of detecting the presence of poison, either to the matter discharged from the stomach, or to the food remaining in the plate in which the food was offered to the sufferer.

2d. The similarity of the symptoms to those produced in other cases from remedial agents, and innocent medicines, or from purely natural causes.

3d. The intent to kill cannot be inferred from the administration of an article not proved to be deadly.

4th. Newly discovered evidence to contradict the testimony of Rebecca as to the degree of her illness, and to prove by a witness that she herself partook with impunity of the food from the same pot at the same time.

5th. The general good disposition of prisoner, and the

absence of evidence of general or special malice, independently of the act alleged, and the want of evidence of adequate motive.

6th. The absence of prisoner's original counsel, the counsel who defended the prisoner not having been appointed until the morning of the trial.

7th. The status and condition of the prisoner whose ignorance almost wholly incapacitated him from affording his counsel any intelligent or useful information in the conduct of the case.

The Court having refused a new trial, the prisoner by his counsel appealed.

A. L. Woodward, for Appellant.

PROPOSITIONS ON THE MERITS.

1. In criminal jurisprudence, upon the plea of *not guilty,* the accused being deemed innocent in the eye of the law, this presumption is sufficient, in all doubtful cases, to turn the scale in his favor. Neither preponderance of evidence, nor any weight of preponderant evidence, can be considered proof of guilt, unless it establish beyond all reasonable doubt the fact alleged and generate entire belief and conviction of the truth of the charge—*the intent and malice averred.*

II. It is not enough that the evidence tends to show the guilt of the accused; it must be inconsistent with any reasonable supposition of his innocence.

III. Where the act, *per se,* constitutes the crime, the fact alleged as the *corpus delicti* must be proved by evidence amounting to demonstration.

In the cases of poisoning, the article, substance or thing alleged to be poisonous in its nature must, be *proved to be so,* and the fact that it was prepared, exhibited or administered by the prisoner must be established by incontro-

vertible evidence. Otherwise, neither can malice be imputed nor the intent charged be inferred. Evidence of sensations and symptoms which the patient and physician describe is not sufficient to authorize a verdict of conviction, such evidence not being, in this class of cases, uniform and consistent indications of the fact alleged, viz: *the presence of poison,* and, therefore, uncertain, unreliable and delusive.

IV. Adequate intelligence, knowledge and capacity in the accused, possession of the instrument or means of the crime alleged, opportunity, occasion and facilities for the use, some probable *motive* to the consummation of the act, or malicious purpose in its execution, must be satisfactorily shown, either by previous conduct, disposition or declarations evincive of animosity, mischief or ill will. And the good character of the prisoner, in reference to the disposition or trait of character in issue, and the good terms or friendly relations subsisting between the parties, are admissible in evidence to repel the charge of criminal intention. Authorities: 3 Greenleaf Evidence, p. 29, § 29, p. 125, § 135, p. 25, sec. 25, Notes; 1 Starkie on Ev., p. 567-70-72-74; 2 Starkie on Ev., 675-76, 691, 719. Medical authors: Hooper's Med. Dic.; 2 Dunglesson's Med. Dic.; 2 Beck's Medical Jurisprudence, pp. 276-77, 28*a*-86-88; Diseases similar to effects of poison, 297, 298; Arsenic, 368-71 to 73, (note;) Tartaremetic, 460-61. Taylor's Med. Juris., pp. 44, 45, 79, 80, 114-15-17, 131-32, 159-60. Law Library, vol. 33: Wills on Circumstantial Evidence, pp. 20 to 22, 27 to 30, 32, 68, 69, 70 to 81; Cases on Poisoning, 87 to 96; Wharton's Criminal Law, 389-90 to 93.

PROPOSITIONS ON NEW TRIAL.

1. A new trial will be granted if the verdict be against evidence on any material point, or be not based upon sufficent evidence to sustain it, especially where the evi-

dence on which the verdict is founded is not the species or degree of evidence which the law in such a case would require.

II. New trial will be granted on the ground of newly discovered evidence, where such was previously unknown, if such be material to the issue or would probably have had an influence on the verdict, either by proving distinct contradictory facts, part of the *res gestae,* or by otherwise rendering doubtful the evidence adduced by the State on the trial.

III. New trial will be granted for error in the instructions of the court, whether in reference to the rules of evidence or *the law upon the subject-matter of the case;* and this, though the instructions be strictly correct so far as given, yet, if they be not sufficiently definite, explicit and full, or tend to create an erroneous impression on a material point, or to mislead the jury, or to induce misapprehension or mistake and a wrong or false estimate of the comparative weight and value of the evidence.

IV. Where proof of the *corpus delicti* consists entirely of *circumstantial evidence,* every material circumstance must be satisfactorily established, no inference being legitimately deducable from such evidence, unless the circumstances to be either separately or concurrently conclusive, and inferences such as the evidence may fully authorize.

V. The trial must have been deliberate, full and fair—not pressed, urgent, hurried or imperfect. There must have been ample time for the preparation of the defence, both in ascertaining evidence, summoning witnesses and inspecting the venire, and for the preparation of counsel on evidence and law, especially where, from the *social status* and *condition* of the prisoner and the position of his counsel, newly appointed by the court, no want of diligence could, under the circumstances, be reasonably attributed to either.

VI. Courts are more liberal in granting new trials in criminal than in civil causes, both from the vast difference of the rules of evidence in comparative weight and degree in the respective forums, and from the difference in the importance and value of the stake involved, which is immeasurable both to the prisoner and the country. Authorities: Graham on New Trial; Wash. Cir. Ct. Rep.; Hammond vs. The State, 5 Strobh. Law, 91, 100; Bedford vs. The State, 5 Humph., 552; Copeland vs. The State, 7 Humph, 481-82-83; Cochrane vs. The State, Ib. 544-45-46-47; Troxdale vs. The State, 9 Hump., 411; Garland vs. The State, 2 Swann, 18, 20, 21, 22, 26; Nelson vs. The State, Ib., 261-62; The State vs. Dow, 19 Conn., 388-91-92-93; 8 S. & M., 401, 417.

ARGUMENT.

The indictment rests on three predicates, upon every one of which the State is bound to offer a satisfactory affirmative solution.

1. That the article, substance or thing alleged to have been administered was of a poisonous, deadly and destructive nature.

11. That it was administered by the prisoner.

III. That it was administered by him, knowing its nature or quality, "with intent to kill."

To controvert these premises, the plaintiff in error assumes these general propositions, viz:

I. That the poisonous, deadly and destructive nature of the article or substance alleged to have been administered was not satisfactorily established in evidence.

II. That the *effect* which the charge imputes not having been produced, the *intention* cannot be inferred without sufficient evidence of the prisoner's *knowledge* of the poisonous, deadly and destructive nature of the article or sub-

stance alleged to have been administered, the effects or consequences proved not affording a conclusive presumption of such knowledge.

III. That, therefore, if the article or substance administered were poisonous in its nature, it may be presumed to have been given in ignorance of such quality, and thus the criminal intention is repelled.

IV. That even if the prisoner was aware of the poisonous quality of the article, it was administered in such an infinitesimal dose that a fatal purpose cannot be presumed.

V. That an innocent medicine—tarteremetic for instance—would produce similar symptoms or effects, and thus a presumptive criminal intention is negatived.

VI. That the food itself from its quality, condition and mode of cooking, might or probably would produce like effects, and may therefore be assigned as *the sole and exclusive existing cause.*

VII. That the entire absence of any probable *motive,* the good character of the prisoner as to the disposition or trait in issue, and the good terms subsisting between the parties, negative any presumption against him in the absence of proof of the *corpus delicti.*

Upon these propositions the counsel contended that analytical or chemical tests afford the only safe, sufficient, satisfactory and reliable evidence in cases of poisoning, and that evidence from sensations and symptoms in this class of cases, being assimilated to those produced and exhibited by the administration of innocent medicines, or from other and simply natural causes, are apt to be mistaken and confounded. Therefore, where symptoms exist alike in different diseases, they cannot consistently and beyond reasonable doubt be asserted or assumed to be distinctive of, or peculiar, or exclusive to *any particular one.*

And finally, that where the mechanical coincidences or

physical and scientific evidences are defective, these being essential to, and constituting proof of the *corpus delicti*, they cannot be supplied by moral coincidences alone, these being merely *corroborative and supplemental* in their character and legitimate effects; and where the moral evidence *is itself defective* there is no basis remaining on which a verdict of conviction can be sustained.

The counsel also contends, that the instructions of the court are exceptionable and defective, not being sufficiently explicit and full, and in requiring exculpatory evidence *to be exclusively adduced by the prisoner,* omitting the important addenda and modification, that it may arise or be deduced from the evidence on the part of *the State.* And farther, that the instructions are also exceptionable in ruling that the *quantity* and *quality* of the article or substance, alleged to be poisonous, is immaterial in evidence, or not necessary to be proved, for as the counsel contends, this rule applies only in cases where the effect is *fatal* in its termination, and that such a rule is of no force in a case where the sufferer survives. In the one case the effect being produced, it may be unnecessary to inquire into the *extent* or *degree of its cause,* whereas, in the other case, *ex. gr.,* the one pending nature, quality, extent or degree of the cause of certain effects and certain consequences, is the very question to be solved, the main issue presented, and of course *the exclusive subject matter of judicial investigation,* for it is upon this, that the question of *malice and intention depend,* and these are of the essence of the crime.

And lastly, that the *social status* or grade, and the friendless condition, as well as the ignorance and mental infirmity of the prisoner, *and the peculiar circumstances* under which the trial took place, are such, that a new trial ought to be awarded.

Joe, a person of color, vs. The State—Opinion of Court.

The Attorney General for the State.

BALTZELL, C. J., delivered the opinion of the court.

This is an appeal from a conviction and sentence of leath, passed upon the prisoner Joe on a charge of having ıdministered poison and white arsenic to a negro woman, Rebecca. She did not die from the alleged effects, but is :xamined as the only witness to the facts of the case, ex-:epting the medical attendant.

But little complaint is made of the instructions given to :he jury, which seem to have been drawn with exceeding :are and caution on the part of the Judge below, and are, on the whole, liberal to the prisoner. Reliance is placed n this court, on the motion for a new trial presented to ınd overruled by the court below, and the broad position ıssumed that the facts of the case do not establish a case of guilt.

It is rather a singular circumstance that new trials were never granted until within a recent period in England, in :ases of felony, this object being in some degree attained by the Judge reversing a point of difficulty for the decision of the court above. The courts of this country have main-tained a different practice, even granting a new trial where the case was either against the weight of evidence or not sustained by it. Appeals are not often allowed in criminal cases, and if permitted, the assignment of error is usually confined to questions of law. In this State, the appeal is not only allowed but the duty is imposed upon the court of examining into the correctness of the ruling as to the refusal of a new trial.

The crime of poisoning is of so shocking a character—so revolting to every sentiment of our nature—so far exceed-ing all others in atrocity—that we have not been able to yield a willing ear to the accusation, or to admit it with

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ready facility. If true, the punishment of the law would not be by any means too severe. With a due sense of its importance, as well to the public as to the prisoner, not at all diminished by the fact that the individual implicated is a free man of color, we approach the consideration of the subject.

The cases to be found in the books, both medical and legal, exhibit abundant evidence of the absence of proper skill and acquaintance with the subject, creating the fearful impression that many, very many, innocent persons have been sacrificed to prejudice and ignorance rather than to actual guilt.

Modern science with its pervading power has removed this difficulty by substituting certainty in place of the obscurity that has so long prevailed. To the philosopher, the man of science, the physician, the world is indebted for important aid in judicial investigations through means of chemical tests applied to matter ejected from the stomach and bowels and to the different parts of the body. A remarkable instance of the certainty attending such an examination is given in the Edinborough Medical Journal of Science as having occurred in Paris. The head, trunk and two lower extremities of a man were found in different and distant parts of the city, and were subjected to the scrutiny and examination of physicians, who, applying to them the results of science and skill, came to the conclusion that the individual was killed during sleep—a sleep induced by artificial means, that this was the result of drunkenness or the effect of some narcotic; that the throat must have been cut and an immense quantity of blood lost—that the decapitation and cutting off the limbs must have been immediately performed by a person accustomed to such operations. That the instrument was sharp edged and long, that the person committing the act must have been a vigo-

rous person, and the incisions made by the same hand, but the murderer became nervous at the close of the deed.

They then examined the internal parts and came to the conclusion that the deceased labored under no disease. In examining the contents of the stomach, they found a small quantity of alcohol and prussic acid. A few weeks afterwards, the murderer delivered himself up and confessed, confirming in a remarkable degree these various opinions of the Physicians. Wills on Circumstantial Ev., 244.

The German and French authors on medical jurisprudence, hold that poisoning can never be completely established unless the particular poison be found; a doctrine not adopted in English jurisprudence. Wills, 215, 16.

Yet this accomplished author says—"Upon general principles it cannot be doubted that Courts of Law would require chemical evidence of the poisoning whenever it was attainable, and it is believed that no modern case of satisfactory conviction can be adduced where there has not been such evidence, or in its absence, the equivalent of confession." Wills, 221.

"The most decisive and satisfactory evidence of poisoning, says this author, is the discovery by chemical means of the existence of poison in the body, in the matter ejected from the stomach, or in the food or drinks of which the sufferer has partaken." Wills, 215.

"It is even maintained, that conviction cannot be considered satisfactory where circumstances of suspicion even, are blended with the scientific testimony, unless the crime be established by adequate evidence independently of moral circumstances." Wills, 233—4.

In the case before us there was no examination of any kind made. The contents of the stomach and bowels were not even noticed until a day afterwards; and this material part of evidence, so important to the ascertainment of

truth, is wholly wanting. In the symptoms, and these alone, is there evidence of guilt.

Before noticing these, it is proper to advert to the weight and consequence assigned to such evidence in books of authority, legal as well as medical. "Medical writers appear to be agreed in opinion that the symptoms and *post mortem* examination, which are commonly incident to cases of poisonings, are such as in general may be produced by other causes." Wills, 211; Wharton's Criminal Law, 3 ed., 391.

The Penny Cyclopedia, in an elaborate article, containing a review of the subjects, says: "It is evident from these circumstances, that in a fatal case of suspected poisoning by an irritant subject, it will seldom be possible to decide upon the evidence of the symptoms alone. When poison has actually been taken, the symptoms are sometimes so modified by circumstances peculiar to the case, that, even where they have been carefully observed, much doubt has remained respecting their cause; and, on the other hand, the symptoms of naturally excited disease often too closely resemble those of poison to permit a positive conclusion being arrived at." Vol. 18, p. 307.

"The circumstances that usually first excite suspicion of poison having been taken are, that the person affected is suddenly attacked by symptoms of severe illness, which come on soon after eating or drinking, without any premonitory indications, which regularly increase in severity without undergoing any important change in their character, and which rapidly prove fatal. All these, however, are far from affording sufficient evidence of poisoning. Suddenness of attack is common to many disorders, as cholera, (whether ordinary or Asiatic,) plague, perforating ulceration of the digestive canal, appoplexy and epilepsy; and even in some cases of fever, the premonitory symp-

toms are too slight to attract the attention of the patient." Ibid, 307.

Whilst, then, symptoms, as a general rule, may not be relied upon as giving satisfactory evidence of the use or presence of poison, the question yet arises, may not symptoms, in the specific case of poisoning by arsenic by irritent subjects, when applied to those proved to exist in the case under consideration, sustain the conviction and establish the guilt of the prisoner?

It is much to be regretted, that in the solution of these important questions we have not the aid of the intelligent physicians who gave to the jury a description of the symptoms usual in cases of poisoning by arsenic, their statement not being fully incorporated in the record, and only a few symptoms described by one of them; and thus we are necessarily thrown upon our own imperfect knowledge and researches in prosecuting our investigation, upon the authorities cited in the brief of the prisoner's counsel, the positions assumed and the views presented in his argument. It is true the attending physician expresses his opinion that the case exhibited specific symptoms of poisoning by arsenic, yet, with all respect for his intelligence and learning, we should not deem that we had discharged our duty in relying upon that alone without a more extended examination. It must be remembered, too, that his evidence is necessarily imperfect, as he saw none of the symptoms of the first day, nor noticed the appearances of matter ejected from the stomach and bowels at this period most important and interesting of all others to the true understanding of the subject. The witness speaks also of symptoms not specified in the record from which we infer that some, possibly essential to the formation of a right judgment, are omitted. If this be so, it is deeply to be regretted, as the court must decide the case upon the

facts set forth in the record, and are not permitted to presume any not presented.

Let us now refer to the facts developed by the evidence in the case under consideration. The prisoner and the person complaining of being poisoned, a slave named Rebecca, were at work at Mrs. Gerards, in Tallahassee, both engaged in getting breakfast— the woman for the white family— The prisoner handed Rebecca some cow haslet which he had been cooking in an iron pot, asking her to eat; she ate about six mouths full and immediately felt a pain in the heart; can't express the rest of her feelings; felt as if she wanted to throw up but could not just then. Commenced vomiting about 11 o'clock of that day; was blind when the misery was on, had great pain in the breast, then all over. For two or three months was unable to work much at anything, had not been sick before eating the haslet, felt effects immediately after eating, felt as if going to die; had painful and bloody discharges." This is the statement of Rebecca herself.

A physician was not called in until the second day; he speaks of the appearance of the patient as follows: "There was frequent vomiting and discharges from the bowels, both tinged with blood; legs partially paralized, great tenderness about the stomach, patient a week under treatment."

Do these facts as detailed by the witnesses, of themselves afford sufficient and satisfactory evidence of poisoning, and are they such as to remove all reasonable doubt that poisoning and nothing else, produced the symptoms exhibited? Could not the animal food itself, especially this particular kind, in any supposable case of imperfect cookery, the article itself perhaps unfit to be eaten, or in a bad state of preservation, possibly eaten in a disturbed condition of the stomach have produced such effects? Could they not

Opinion of Court.

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the act of swallowing." Penny Cyclopedia, Poison, 307.

Beck represents the symptoms of poisoning by arsenic "so remarkable as not to be confounded with natural disease." He states them to be "marks of irritation extending from the throat to the rectum, the difficulty in swallowing, the pains of the bladder in passing water, the affections of the genitals, the vomiting and bloody diarrhea, extreme weakness." 2 Beck, 417.

The same writer gives us the earliest symptoms, sickness or faintness, succeeded by pain in the region of the stomach, most commonly of a burning kind, much aggravated by pressure; violent fits of vomiting and retching, with a dryness, heat and tightness in the throat, creating an incessant desire for drink, hoarseness and difficulty of speech, matter vomited greenish or yellowish, but sometimes streaked or mixed with blood. The burning of the throat not always present, sometimes so severe as to be attended with fits of suffocation and convulsive vomiting. Diarrhea generally, not always —when this is severe the rectum is excoriated and burning heat felt there and along the whole of the alimentary canal; mouth and lips inflamed and present dark specks and blisters, lungs affected, shortness of breath, tightness across the chest and in a few cases actual inflammation, &c., &c., p. 370.

Where life is prolonged several days or saved, the early symptoms are of the inflammatory variety, as just described. The subsequent ones are referrable to nervous irritation. They vary from coma to an imperfect palsy of the arms and legs, and between these extremes are observed epileptic fits or tetanus.

Among occasional results where life is saved are irritability of the stomach, attended with constant vomiting of food, loss of the hair and disquamation of the cuticle, soreness and inflammation of the eyes," &c. Ibid, 372.

It will be clearly perceived, we think, that the case before us is defective in many of the most prominent distinctive symptoms described by the authors above quoted as most reliable in discriminating cases of poisoning by arsenic from those of disease produced by other causes. The symptoms exhibited in the present case are very few, and by no means create the clear and distinct impression upon the mind which is made by those described by authors on medical jurisprudence as peculiar to this particular kind of poisoning.

Passing this branch of the subject, we next proceed to the enquiry whether there are other circumstances in the case regarded as giving weight and force to the accusation. "There are particulars of moral conduct," says the writer so often quoted, that "by writers on circumstantial evidence are considered as leading to important and well-grounded presumptions as motives to crime, declarations indicative of intention, preparations for the commission of crime, possession of the fruits of crime, refusal to account for appearances of suspicion, or unsatisfactory explanation of such appearances with evidence, indirectly confessional." Wills, 55.

"If it be proved that a party charged with crime has been placed in circumstances which commonly operate as inducements to commit the act in question; that he has so far yielded to the operation of those inducements as to have manifested the disposition to commit the particular crime; that he has possessed the requisite means and opportunities of effecting the object of his wishes; that recently after the commission of the act in question has become possessed of the fruits or other consequential advantages of the crime; if he be identified with the *corpus delicti* by any conclusive mechanical circumstances as by the impression of his footsteps, &c., if there be relevant ap-

pearances of suspicion connected with his conduct, &c., such as he might reasonably be presumed to be able to account for, but which he will not and cannot explain, &c., &c., the concurrence of all or many of these urgent circumstances naturally, reasonably and satisfactorily establishes the moral certainty of his personal guilt, if not with the same degree of assurance as if he had been seen to commit the deed, at least with all the assurance which the nature of the case and the vast majority of human actions admit." Wills, 250.

Now, this part of the case is not only deficient and wanting in everything to create a presumption unfavorable to the prisoner, but the proof of the person alleged to be poisoned removes and prevents a supposition of this even. "She and the prisoner never had a falling out, and were always on good terms." She was a slave, too; had no money to tempt her destruction. There was nothing to gain—no fear of loss.

Having thus considered the facts of the case and the law connected therewith, it may aid in the consideration of cases depending upon circumstantial evidence to refer to the rules and maxims which philosophic wisdom and judicial experience have laid down as safeguards of truth and justice with respect to evidence in general, and which apply with peculiar force to cases of the present character.

"The facts alleged as the basis of the inference must be strictly connected with the *factum probandum*." Wills, 177.

"The circumstances proved must lead to and establish to a moral certainty the particular hypothesis assigned, to account for them. In other words, the facts must be of such a nature that their existence is absolutely inconsistent with the non-existence of their alleged moral cause

and that they cannot be explained upon any other reasonable explanation." Ibid, 187.

"The conclusion drawn from the premises assigned as its basis, must satisfactorily explain and account for all the facts to the exclusion of every other reasonable solution." *Ibid* 187.

"If the circumstances are equally capable of solution upon the hypothesis of innocence, as upon that of guilt they ought to receive a favorable construction, and to be discarded as presumptions of guilt." *Ibid* 187,-8.

"If there be any reasonable doubt as to the proof of the *corpus delicti,* or as to the reality of the connection of the circumstances of evidence with the *factum probandum,* or as to the proper conclusion to be drawn from these circumstances, it is safer and therefore better to err in acquitting than in convicting." *Ibid* 189, 190.

These rules are not needed to the conclusion we have arrived at in the present case.

It has been seen very clearly, that there is no direct proof of poison traced to the prisoner from the beginning to the end of this transaction—none of the fact of poisoning. That the indirect proof considered satisfactory in such cases—that of chemical analysis and tests applied to the matter ejected through the influences of the poison from the stomach and bowels, and of all moral circumstances is wanting. That the only fact relied upon, that of symptoms admitted in cases of this nature to be unsatisfactory and unreliable, in this case is particularly defective and unsatisfactory.—Where then is there ground for conviction? Without saying that there is none, we are clearly of opinion that there is not sufficient to justify the conviction, and that the prisoner is rightfully entitled to a new trial.

The judgment will be reversed and the cause remanded for a new trial and other proceedings to be had.

FREDERICK R. COTTEN AND WILLIAM G. PONDER, APPELLANTS, VS. THE COUNTY COMMISSIONERS OF LEON COUNTY, ET AL. APPELLEES.

1. Under our State Constitution it is the appropriate function of the judicial department to decide whether a statute of the Legislature, be or not constitutional; but in deference to a co-ordinate branch of the Government, it ought never to nullify a statute, except in a case free from doubt.

2. In proceeding to define and determine the constitutional power of the Legislative department, it is proper to note the characteristic difference which marks our Federal and State Constitutions. Whilst the former contains only specific grants of powers, the latter makes a general grant of all the political power of the people, restrained only by specific reservations. Hence in determining upon the validity of statutes the acts of Congress are to be construed with greater stringency, than the acts passed by our General Assembly.

3. No certain rule can be prescribed by which to determine when a work of internal improvement shall be deemed to be embraced within the meaning of the phrase, "County purpose" as the same is used in the 4th clause of the 8th article of the State Constitution. Neither the *locality* of the work, nor the anticipated *benefit* to be derived from it, is of itself a certain test; but as furnishing a general rule, the concurrence of the two would seem to be required.

4. Whether the 2d section of 8th article of the State Constitution imposes an imperative *restriction* upon the taxing power of the General Assembly, and such an one as can be enforced by the judicial department, or whether it is only discretionary. *Quere!*

5. That the Pensacola and Georgia Railroad Company, is a private corporation, affords no valid reason why the shares of its capital stock, purchased by and on behalf of the County of Leon, should not be deemed to be the public property of the citizens of the County.

6. The act of subscription to the capital stock of the Pensacola and Georgia Railroad Company, by the Board of County Commissioners of Leon County, is within the meaning of the phrase "County purposes" as used in the Constitution of the State.

7. The word "necessary" occuring in the 2d clause of the 8th article of the Constitution and by implication transferred to the 4th clause of the same article, when applied to the taxing power of the county authorities is to be

taken rather as an indication of a grant of *discretion*, to be exercised within the appropriate limits of their general power, than as a restraint upon that power.

8. The provision of the act, which required that a subscription to the Stock of the Railroad Company, by the County Commissioners, should depend upon a vote of the qualified voters of the county, was not a delegation to the people of legislative powers, but only a legitimate mode of obtaining an expression of the will of the constituent, as a guide for the action of the representative.

9. The provision contained in the act, that each tax-payer should receive a remuneration in the shape of Stock in the Railroad Company, equivalent to the amount of his tax assessment, is not in conflict with either the 1st or 24th clauses of our "Declaration of Rights."

10. The provision of the act which authorize the counties to issue Bonds for the purpose of raising money to pay for the stock to be purchased, does not contravene the letter or spirit of the 13th clause of the 13th article of the Constitution, which prohibits the General Assembly from pledging the faith and credit of the State to raise funds in aid of Corporations.

11. The 22d section of the act of the General Assembly of 1855, entitled "An act to provide for and encourage a liberal system of Internal Improvements in this State," declared to be constitutional.

Appeal from Leon Circuit Court sitting in Chancery.

Appellants filed their bill for an injunction to restrain the County Commissioners of Leon County from levying and collecting a tax imposed by them to meet an instalment of stock subscribed by the County in the Pensacola and Georgia Railroad Company.

On presenting the bill, an injunction was granted, which however, was dissolved on the coming in of the answer, and the bill was dismissed.

The question presented by the pleadings for the decision of the court, is, whether the General Assembly has the constitutional power to confer upon counties as attempted by the "act to provide for and encourage a liberal system of Internal Improvements in this State," passed in January, 1855, the authority to subscribe for shares in the capital stock of certain Railroad Companies, and impose and collect taxes for the payment thereof.

M. D. Papy, and D. P. Hogue, for Appellants.

Jas. T. Archer and A. L. Woodward, for Appellees.

DUPONT, J., delivered the opinion of the court.

It would prove but a useless waste of words—an unprofitable expenditure of time—to engage in any labored effort to impress the importance of the question presented by this case for the adjudication of the court.

The bare announcement that it involves the construction and interpretation to be given to certain clauses of the Constitution of the State—the fundamental law of the land—the embodiment of the delegated sovereignty of the people—is a sufficient guarantee that it has received at the hands of the court that calm, thorough and anxious consideration which befitted the occasion. Without, therefore, indulging in the encomiums upon our republican institutions which usually constitute the exordium to efforts of this character, we the rather address ourselves at once to the particular point involved in the case, and, aided as we have been by the arguments and investigations of the able counsel engaged on either side, we shall endeavor, plainly and briefly as we may, to assign the reasons which have operated to conduct our minds to the conclusions at which we have arrived.

Before, however, entering upon the discussion of this point, it may not be inappropriate or unprofitable to consider and endeavor to define the legitimate power of the judicial department, when called upon to arrest the action of a co-ordinate branch of the government. Indeed, we deem a clear apprehension of the limits of this power not only essential to the harmony of the three great departments which have been established by the fundamental law as contained in their State Constitution, but absolutely

necessary for the very conservation of that instrument itself; for it has happened, and may again happen, that the arm which is invoked for the protection of that sacred palladium of our political rights may, from a misapprehension of its legitimate functions, give it its most deadly wound. Instances are not lacking to show that the judiciary, in essaying to shield the Constitution against the presumed aggressions of the Legislature, has itself become the greater aggressor. Every enlightened court will be admonished by these instances, of how delicate a character is the duty imposed upon it, when called to decide upon the constitutionality of an act of the Legislature. While it is an essential element in the character of an independent judiciary firmly to maintain and resolutely to exercise its appropriate powers when properly invoked, it is equally its duty to be careful not rashly and inconsiderately to trench upon or invade the precincts of the other departments of the government.

That the judicial department is the proper power in the government to determine whether a statute be or be not constitutional will not, at this day, be questioned. That matter, though once mooted by no less a man than Thomas Jefferson, was put finally to test by the decision in the case of Marbury v. Madison, wherein C. J. Marshall gave it the sanction of his great name. But it is a most grave and important power, not to be exercised lightly or rashly, nor in any case where it cannot be made to appear plainly that the Legislature has exceeded its powers. If there exist upon the mind of the court a reasonable doubt, that doubt must be given in favor of the law. In support of this position is the case of Hylton vs. the United States, 3 Dallas R., 171, in which Mr. Justice Chase declares, "if the court have such power, I am free to declare that I will never exercise it but in a very clear case." And in Cooper

vs. Telfair, 4 Dall., 14, Mr. Justice Washington says, "the presumption must always be in favor of the validity of the laws, if the contrary is not clearly demonstrated." In Fletcher vs. Peek, 8 Cranch R., 87, C. J. Marshall, who in the previous case of Marbury vs. Madison, had dwelt so strenuously upon not only the power but the *duty* of the judiciary to restrain the other departments within their appropriate boundaries, declared, "it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers and its acts to be considered void. The opposition between the Constitution and the laws should be such that the Judge feels a clear and strong conviction of their incompatibility with each other."

In further support of this position may be cited any number of decisions by the State courts. We shall refer to only a few of them, remarking, however, that if there be one to be found which constitutes an exception to the general doctrine, it has escaped our search. In Adams vs. Howe, 14 Mass. R., 345, the doctrine is thus stated: "The Legislature is, in the first instance, to be the judge of its own constitutional powers, and it is only when manifest assumption of authority or misapprehension of it shall clearly appear that the judicial power wil refuse to execute the law." In Wellington vs. Petitioners, &c., 16 Pick. R., 95, the same court announce their determination "never to declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt. In the case of City of Louisville vs. Hiatt, 2 Mon., 170, the Court of Appeals of Kentucky, say: "If it be *doubtful* or *questionable* whether the legislative power has exceeded its limits, the judiciary cannot interfere, though it may not be satisfied that the act is constitutional." The same doctrine is again announced by that

court in the case of Lexington vs. McQuillan's heirs—9 Dan., 514—they declare: "We should be justly chargeable with wandering from the appropriate sphere of the judiciary department were we, by subtle elaboration of abstract principles and metaphysical doubts and difficulties, to endeavor to show that such a power may be questionable, and on such unstable and injudicious ground to defy and overrule the public will, as clearly announced by the legislative organ."

In the case of Police Jury vs. Succession of McDonough, decided in the Supreme Court of Louisiana and reported in 8th Louis. An. Reports, 341, Sliddell, C. J., says: "It is true, that if a statute passed by the Legislature is not warranted by the powers vested in that body, such act cannot have the force of law, and it is the solemn duty of the judiciary so to declare it when an attempt is made through the judiciary to enforce it. But this is a most grave judicial power, not to be exercised lightly nor in any case where it cannot be made to appear plainly that the Legislature has exceeded its powers. In just deference to a coordinate department of the government, it is always to be presumed that a statute is conformable to the Constitution and has the form of law until the contrary is clearly shown."

Ranny, J., in delivering the opinion in the case of the Cincinnati, Wilmington and Zanesville Railroad Company vs. the Commissioners of Clinton county, reported in 1st Ohio State Reports, 77, has placed this matter in such strong light that we cannot resist a further citation, even at the hazard of being considered unnecessarily prolix. He says: "But while the right and duty of interference in a proper case are thus undeniably clear, the principles by which a court should be guided in such an enquiry are equally clear, both upon principle and authority. It is

never to be forgotten that the presumption is always in favor of the validity of the law, and it is only when manifest assumption of authority and clear incompatibility between the Constitution and the law appear that the judicial power can refuse to execute it, which interference can never be permitted in a doubtful case; and this results from the very nature of the question involved in the enquiry. The Legislature is of necessity, in the first instance, to be the judge of its own constitutional powers. Its members act under an oath to support the Constitution, and in every way under responsibilities as great as judicial officers. Their manifest duty is never to exercise a power of doubtful constitutionality. Doubt in their case, as in that of the courts, should be conclusive against all affirmative action. This being their duty, we are bound in all cases to presume they have regarded it, and that they are clearly convinced of their power to pass a law before they put it in the statute book."

But why multiply authority to sustain a proposition so plain—so reasonable and perfectly conclusive to the mind of any one, who has the slightest apprehension of the principles underlying the great fabric of a Republican Government? Upon the rigid observance of the principles embraced in this proposition, depends the harmony of the great departments of the government. Violate it, and soon they will be seen like errant spheres madly shooting from their appropriate orbits, and engendering passion, strife, embarrassment, confusion, uncertainty, where there should alone exist love, peace, union, concord and co-operation.

The Constitutional power of the General Assembly to confer upon the several counties of this State as they have attempted to do by the enactment of the 22d section of the act of 1855, entitled "an act to provide for and encourage a liberal system of Internal Improvements in this State,"

the authority to subscribe for shares in the capital stock of certain Railroad Companies therein referred to, and to provide by taxation through their respective Boards of County Commissioners, for the liquidation of the debt so to be incurred, is the particular question submitted for our decision.

In order to a better understanding of the argument, and as in its progress we shall have occasion to refer specially to its provisions, it may be proper to set forth the section in full. It is as follows:

"SEC. 22. *Be it further enacted,* That it shall be lawful for the Board of County Commisisoners of any county, or the mayor and Council of any city, or the Trustees of any town, through or near which such Railroad or their extensions may pass or in which they may terminate, and they are hereby authorized to subscribe and hold stock in said company, upon the same terms and conditions, and subject to the same restrictions as other stockholders: *Provided,* it shall be first submitted to the vote of the legal voters of said county, city or town, to be held and taken at such times and places, and in such a manner, as said authorities respectively may appoint, whether or not stock shall be taken; and if when the vote be thus taken it shall appear that a majority of the votes shall be in favor of such subscription, it shall thereupon be lawful for the board of county commissioners, city or town authorities, by agents by them appointed, to subscribe and take in such company such an amount of stock as they shall determine: *Provided,* That in no case of county subscription the amount shall exceed fifty per cent of the cost of construction through said county; and to issue the bonds of said county, city or town, payable with interest at such times and places as they may deem proper, and dispose of the same for the payment of such subscription, pledging the faith and resour-

ces of said county, city or town, for the payment of such Bonds and interest, and they shall from time to time, levy and collect such a tax as shall be necessary to pay the instalments of interest on the bonds, as the same become due, or to create a sinking fund for the gradual reduction of the same: *Provided,* That the rate of interest shall not exceed ten per centum per annum; or funds may be raised by such Board of County Commisioners, or city or town authorities, by tax, in such sums or instalments as will meet such subscriptions and the receipt for the payment of such tax, shall entitle the payers thereof of every one hundred dollars so paid, to have one share or more, as the case may be, of the stock so subscribed by said county commissioners, city or town, in said company, and which receipts shall be assignable. No stock held by any county, city or town, shall be assignable by said county, city or town until the bonds issued for the purpose of procuring funds for the payment of said county, city or town subscription, shall be paid, except in exchange for such bonds."

The counsel for the appellants, contesting the exercise of this power by the General Assembly, have cited us to several general principles of government which, even if they were not expressly enunciated in our "Declaration of Rights," are of too universal acceptation in this country to admit of any question as to their correctness. Among the propositions thus cited is the one "that all political power is inherent in the people." While we readily admit the truth of this proposition, we by no means concur in the application which has been made of it, or in the argument attempted to be deduced therefrom. If we correctly apprehend the use intended to be made of this political axiom, it was to assimilate the Federal and State Constitutions and to invoke the same stringency of construction when applied to the one as to the other. But

there exists a manifest difference in the very elements of the two instruments, and this elemental difference induces also a difference in the rules of construction to be applied to either instrument. Whilst the Federal Constitution contains only specific grants of powers, coupled with a general reservation, the State constitution makes a general grant of all the political power of the people, restricted only by specific reservations. This characteristic difference will be readily perceived by a bare reference to the two instruments. In the 8th section of the first article of the Federal Constitution is enumerated specially the several powers delegated to the legislative department of the General Government. But, so jealous were the people of the respective States, that, not content with this special enumeration of the powers intended to be granted, they afterwards forfeited their reserved rights by an affirmative declaration, in the nature of an amendment to that instrument, "that the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Here, as before remarked, is a specific grant, with a general reservation. In section 1st of article 2nd, in our State Constitution, may be found the grant of power which the people have delegated to the State government. It is couched in these terms:

"The powers of the government of the State of Florida shall be divided into three distinct departments, and each of them confined to a separate body of magistracy, to wit: those which are legislative to one; those which are executive to another, and those which are judicial to another."

This is certainly a full, entire and express grant of *all* political power, and may be correctly denominated a general grant; but, in the 27th clause of the first article constituting the "Declaration of Rights," is contained the re-

striction upon that grant, and that clause is in the following words, viz:

"That to guard against transgressions upon the rights of the people, we declare that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or to the following provisions, shall be void."

Here, then, is a general grant of powers, coupled with specific restrictions, and this comparison serves to verify the characteristic difference existing between the two instruments, as before announced. Indeed, all writers who have commented upon the subject, readily admit the elemental difference and freely recognize the difference to be observed in aplying the rules of construction.

Without further elaboration of the general propositions assumed by the counsel for the appellants, we now address ourselves to the specific objections alleged in argument against the power of the General Asembly to pass the section of the act of 1855 complained of. The main argument of the appellants is based upon the assumption that the first and second clauses of the 8th article of the State Constitution contain restrictions upon the taxing power of the General Assembly, and that by implication, if not expressly, all these restrictions are applicable to and control the taxing power of the county authorities. The sections referred to are in these words:

"1st. The General Assembly shall devise and adopt a system of revenue, having regard to an equal and uniform mode of taxation, to be general throughout the State."

"2nd. No other or greater amount of tax or revenue shall at any time be levied than may be required for the necessary expense of government."

The fourth section of the same article, which contains

the only special delegation of power to the counties to tax, is in these words:

"The General Assembly shall have power to authorize the several counties and incorporated towns to impose taxes for county and corporation purposes, respectively, and all property shall be taxed upon the principles established in regard to State taxation."

Now, without undertaking to decide, or even to intimate an opinion, whether the second clause, above referred to, does indeed impose a peremptory restriction, and such an one as can be practically enforced by the judiciary against the general taxing power delegated to the General Assembly, we may, for the sake of argument, admit that it is a restriction and constitutes one of the principles applicable to the taxing power of the counties, as referred to in the 4th clause of the 8th article. That article may then be read thus:

"The General Assembly shall have power to authorize the several counties and incorporated towns of this State to impose taxes for county and corporation purposes respectively; and all property shall be taxed according to an equal and uniform mode of taxation, to be general throughout the county; and no other or greater amount of revenue shall at any time be levied than may be required for necessary county purposes."

This exposition and interpretation of the fourth clause places the matter in the very strongest light contended for on the part of the appellants, and accords to them all the legitimate fruits of their argument upon this objection. It will readily be perceived, then, that the whole argument is narrowed down to the simple enquiry whether or not the act complained against, to wit: the subscription for shares of stock in the Georgia and Pensacola Railroad Company by the Board of County Commisisoners of Leon

county is legitimately a county purpose, within the meanin of the said 4th clause of the 8th article of the Constitution. We think that it is, and, in order to demonstrate the correctness of this conclusion, it may be proper to note the difference existing between the ordinary expenses of the State and county organizations. While the ordinary expenses of the former are mainly induced by the necessary support of the officers required to conduct the business appertaining to the three great departments of the government respectively, that of the latter is confined almost exclusively to the improvement of the social condition of the citizens, there being no salaried officers to support. The Constitution does not attempt to give a definition to the term "ordinary purpose," and to obtain a correct interpretation of that phrase we must look to the contemporaneous legislation upon that subject and the uniform action of the county courts under the territorial government. By this reference it will be abundantly demonstrated, that at that day county purposes were taken to embrace principally the erection and repair of court houses and jails, the opening and maintaining public thoroughfares within the limits of their respective counties, by opening roads, building bridges and causeways, and keeping the same in repair, licensing and regulating ferries and toll-bridges, &c.

It is thus seen, that the entire subject of highways was at the time of the constitution, an object peculiarly within the jurisdiction of the county authorities, and we are hence warranted in the assumption that it was so understood by the Convention when they used the phrase, "County purposes." But we do not understand the appellants to differ from us in this interpretation, when applied to ordinary roads and bridges through a county—the objection is, only when it is sought to apply it to a *"Railroad."* Upon what sound principle this particular species of thorough-

fare is to be withdrawn from the interpretation of the phrase before referred, we are at a loss to perceive. Surely it will not be seriously contended that while the county authorities are permitted in the erection of their court houses and jails, to avail themselves of the improvements in architecture brought about by the advancement so rapidly going on in the arts and sciences, they shall be precluded from availing themselves of the benefits resulting from the most magnificent discovery of the age. With almost as good reason might it be insisted, that they should confine their citizens to treading the tortuous windings of the Indian's "trail" or to the little less primitive thoroughfare of the Pioneer's "bridle way." But not to do injustice to the argument of the appellants, we remark that the objection seems to be, not so much to the particular nature of the work as to the fact, that it is not wholly confined within the territorial limits of the county, and was therefore not embraced in the phrase "county purpose." The counsel who closed the argument for the appellants, contended that the test to be applied to the work as determining its character in this respect, was its locality, while the counsel for the respondents insisted that the true test was to be found in the anticipated *benefits.* We think that neither the one or the other of these tests, taken by themselves, will furnish the correct rule, but as a general rule that it requires a concurrence of both, for it will readily strike the mind of every one, that a great enterprise may be embraced entirely within the limits of a county, and therefore exclusively *local,* without in the slightest degree being entitled to the distinctive character of a county purpose. While on the other hand, another enterprise though entirely without the county limits, may confer innumerable *benefits* upon, and advance the best interests of the county, with as little claim to the character of a county purpose. Indeed it would

be as unprofitable as it is dangerous to attempt to prescribe any definite rule to be looked to as furnishing the correct test on this subject. It is better not to essay to circumscribe by fixed rules, that which no human intellect can fully embrace. Wisdom would counsel, that each case of this kind should be decided as it may arise, untrammelled by the decision of the preceding *one*.

Another argument used to show that the object contemplated by the county subscription does not come within the meaning of the phrase "county purpose" was that the corporation whose stock was subscribed for, was a private corporation. We do not think the argument at all conclusive, for though it be true that the Georgia and Pensacola Railroad Company be a private corporation, yet the stock purchased by the county is certainly public property, and belongs to the citizens of the county, in the proportion of their respective contributions by way of taxes. In further elaboration of our views on this subject, we take it for granted that no one would seriously contest the right of the county to construct a railroad to be located wholly within her territorial limits, provided she possessed the means of herself. Now, if this be admitted, then the point is yielded as to the character of the *object* to be attained, and the only question that can arise, is, as to the lawfulness of the *means* to be employed. In this view of the case, we can discover no objection in the absence of the ability in herself to effect the object, that she should invite the co-operation, not only of contiguous counties, but even of individual capital and enterprise.

The two objections now under consideration, viz: that the purpose of the subscription was not a "county purpose," and "that the corporation through whose agency the road was expected to be built was a private corporation," both came up for consideration in the case of Nicol et al. vs.

Mayor and Aldermen of Nashville, 9 Humph. R., 252, and were so fully discussed, that we feel ourselves constrained to cite somewhat at large from the report of the case. The Judge who delivered the opinion in that case, after stating the two objections, goes on to remark: "This 29th section of the second article of our Constitution provides, that the General Assembly shall have power to authorize the several counties and incorporated towns in the State, to impose taxes for county and corporation purposes, respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation." It may here be noted that this provision in the Tennessee constitution is almost in the very words, and certainly embodies the very spirit of the provision contained in the 4th clause of the 8th article of our constituion. The Judge goes on to say, "the reason why this clause was embraced in our constitution, those contemporaneous with its formation know to have been, that doubts had been suggested by the highest Judicial tribunal of the State, as to whether the taxing power could be delegated by the Legislature to the counties, and to the incorporated towns, and the clause was intended to remove these doubts." Addressing himself particularly to the points under consideration, he proceeds —"Is the making of the road from Nashville to Chattanooga a corporation purpose of the town of Nashville? What is a corporation purpose of the town of Nashville? General definitions, are always difficult to be given with precision and accuracy, especially where they have to cover as extensive ground as that embraced in the expression, "corporation purposes." I shall therefore not attempt to specify what are corporation purposes of the city of Nashville; they are and may be made to be so numerous and diversified as may be found requisite by experience, to pro-

mote the peace, comfort and prosperity of its corporation, and anything which promotes these things, is or may be constituted a legitimate corporation purpose." * * * "Such are all facilities of canals, roads, the improvement of rivers, by which their navigable use is extended, by all which the commercial interests of a town is increased and expanded by reason of the increased facilities of communications thus furnished, by means of which, the wealth of its populators individually and collectively is increased with a consequent increase of the comforts and enjoyments of life."

It is true these improvements must have some connexion with the corporate town claiming them as corporate purposes more direct than that which would result from the general increased prosperity of the country by reason of such improvements, made without a direct reference to or indirect connexion with the town. That is, the improvement claimed to be a corporate purpose, of the character under discussion, must have such relation to the town as to be the medium through which this prosperity is attained. It must begin or terminate at the town, or pass through or so near to it as to be capable of effecting its direct interests. It would seem to be an incontestable truth, that a corporate town, is deeply interested in the making of any road or other means of transportation and travel whereby the facilities of its commerce are increased—and, if it be so interested, why shall it not become a corporate purpose to have them made? It would really seem almost useless to argue in favor of it. Is there anything illegal in it? Is there anything against good morals in it? Is there anything against public good in it? Surely not. A town is situated ten miles from a navigable stream. It is obvious that it would be a matter of great importance to the town, its commerce and general prosperity, to have a railroad or McAdamized road to the river. It concerns no

one else but this town, and no one else will make it. Shall it not become a corporate purpose of this town to make it, if it be able? Surely no one will deny but that it may."* * * "If a corporation may make the road, may it not join with others to make it? If the undertaking be too expensive to be carried into execution by the corporation itself, or, if others be desirous of uniting with it for the effectuating of the design, why may they not unite? Again, it may be asked, is there anything wrong in this? Is there anything against the public good in this? Is there anything against law in this? Surely not."

These views are so simply and forcibly expresesd, and at the same time are so pertinent to the points under discussion, that we have, at the hazard of extending this opinion to an unreasonable length, deemed it profitable to refer to and cite them fully.

Sliddell, C. J., of the Supreme Court of Louisiana, expressed similar views upon the same point, which arose in the case of Police Jury vs. Succession of McDonough, (8 Louisiana An. Reports, 341,) which was decided as late as the year 1853. Referring to the enquiry what are *county purposes,* he remarks: "This question is not a new one; on the contrary, it has been frequently subjected to rigorous judicial investigation, and its answer may be satisfactorily found in the illustrations which are presented in decided cases. Thus, in the case of Goddin vs. Crump, 8 Leigh's Virginia Reports, the improvement of James and Kanawha rivers was considered, as regards the city of Richmond, a local purpose by reason of its connexion with the commercial prosperity of that city."

After citing the observations of Tucker, J., in the last foregoing case, and several others to the same point, he proceeds to express the following enlightened views: "If the decisions cited be true exponents of the law, as we

think they are, their application to the present case is obvious. The contemplated railroad passes through the territorial limits of this corporation and has one of its *termini* there. If the enterprise is successful, the results which have been experienced in other towns and sections of the Union may be realized here. Its facilities of commerce may be enhanced. An impulse to industry within its limits may be given—its population augmented—its lands rise in value. Whether these prosperous results will ensue, is in the womb of the future. But it is evident that the Legislature expected them, and it is clear that the police jury and a majority of the voters so thought. The Legislature plainly declared such an enterprise to be within the range of their corporate purposes. The policy jury, acting under the legislative sanction, declared by their ordinance their opinion that the measure would conduce to the interests of their locality, and a majority of the tax-payers have concurred in that opinion. Whether their expectation is false or well founded is not, under such a state of legislation, a judicial question. We take it to be a well settled principle, that if the Legislature can constitutionally exercise a power, it is to be presumed by the judiciary, in just deference to a co-ordinate branch of the government, that in the particular case it was exercised discreetly and with a deliberate and just regard to the interests of its citizens."—(Citing the opinion of C. J. Shaw, in the case of Norwich vs. The County Commissioners, 13 Pick., 62.)

We might cite several other cases, going to illustrate the meaning of the term "county purpose," but we deem the foregoing sufficient to warrant us in declaring the act of subscription to the capital stock of the Georgia and Pensacola Railroad Company, by the Board of County Commissioners of Leon county, to be fully within the letter and spirit of that phrase.

It was urged with much earnestness at bar, that the word "necessary," in the connection in which it occurs in the 2nd clause of the 8th article of the Constitution, and by implication transferred to the 4th clause of the same article, qualifies the term "county purposes" occurring in the latter clause, and that it ought to exercise a potent influence in determining the true meaning of that term. It was argued that the word *necessary,* in this connection, must be taken to limit the action of the county authorities to such purposes only as were *indispensable* to promote the interests of the county. In other words, that it restrained their action to the superintendence of the *ordinary* affairs of the county. However this may be when applied to the expenses of the State government, (of which we desire to intimate no opinion,) we are very clear, that as applied to the counties, the term does not have the effect contended for. The word *necessary* is an adjective possessing degrees. A thing or purpose may be necessary, more necessary, indispensably necessary. An object simply necessary to subserve the interests of a county is as much a "county purpose" as though that object were indispensably necessary. We do not see that a reference to the term furnishes any light to the interpretation of the phrase "county purpose," or that it serves in the slightest degree to fix or limit the true meaning of that phrase. If, indeed, it had any distinctive meaning in the connection to which it is sought to apply it, (and we are rather of the opinion that it has,) we are inclined to think that that meaning is precisely the reverse of that contended for in the argument for the appellants, and that it is rather the indication of a grant of discretionary power, to be exercised by the county authorities within the appropriate limits of their general powers, than a restraint upon those powers.

As pertinent to the matter under discussion, we cannot

more forcibly express our views than by citing the very lucid comments of Chancellor Kent upon a kindred subject, to-wit: the constitutional powers of the Federal Government. We remark incidentally, however, that while we fully adopt the logic of the distinguished commentator, we by no means desire to be considered as sanctioning his application of it. The reasoning may be perfectly sound when applied to a government of general powers, such as our State government, and yet wholly fatal and inconclusive when applied to a government possessing only enumerated powers, such as is the Federal Government.

He says—"The constitution has not left the right of Congress to employ necessary means for the execution of its powers to general reasoning. It is expressly authorized to employ such means; and *necessary* means, in the sense of the constitution, does not import an absolute physical necessity so strong that one thing cannot exist without the other. It stands for any means calculated to produce the end. The word necessary admits of all degrees of comparison. A thing may be necessary, or very necessary, or absolutely and indispensably necessary. The word is used in various senses, and in its construction the subject, the context, the intention, are all to be taken into view. The powers of the government were given for the welfare of the nation. They were intended to endure for ages to come, and to be adapted to the various crises of human affairs. To prescribe the specific means by which government should in all future time execute its powers, and to confine its choice of means to such narrow limits as should not leave it in the power of Congress to adopt any which might be appropriate and conducive to the end, would be most unwise and pernicious, because it would be an attempt to provide by immutable rules, for exigencies which if foreseen at all must have been seen dimly, and would deprive the legislature of

the capacity to avail itself of experience or to exercise its reason and accommodate its legislation to circumstances. If the end be legitimate and within the scope of the constitution, all means which are appropriate and adapted to this end, and which are not prohibited are lawful." 1 Kent Com., 252. These views are as logical in expression, as they are beautiful in conception, and appropriately applied, are overwhelmingly conclusive. We belong not to the latitudinarian school, but our every lesson on the subject of government has taught us to discriminate the distinctive elemental nature of the Federal and State organizations. While the one is simply a confederation of separate and independent political sovereignties, each striving for the mastery—the other is the pure embodiment of the will of the people, and constitutes a unit.

Accustomed to witness the ceaseless conflicts of opposing powers, whether our eyes be turned to our own Federal organization, or to the monarchial governments of Europe, we have learned to give expression to our political jealousy without duly considering the appropriateness of its application. Here under our State government we have no exacting John—no jealous and determined Baron. The people's breath creates the sovereign. The people's breath can demolish it. All these harsh epithets then, so richly abounding in one of the dissenting opinions, cited at the argument of this case—such as "piracy," "licensed robbery," "spoliation by a dominant faction," and the like, we conceive to have been uncalled for, in the connection in which they are to be found, and are to be admitted, rather for spiciness, than for their rhetorical taste or political applicability.

Another objection urged against the validity of the act of subscription to the stock of the railroad company, and one that at the first blush is rather imposing and plausi-

ble is, that by the terms of the statute its operating vitality was made to depend wholly upon the votes of the people. The position assumed in the argument was, that this act of submission amounted in fact to a virtual delegation of the taxing power to the people, and therefore a clear violation of those clauses of the Constitution which confines the exercise of that power to the General Assembly, and by their permission to the respective county authorities. If the view taken of this subject by the appellants were correct, and it be true that the act in question does not delegate the people the authority to make subscription and the consequent power to levy taxes to pay for the same, we have no hesitancy in declaring such an act of the Legislature to be a palpable infraction of the Constitution, and one that would demand the prompt interposition of the judiciary. It would clearly be changing the essential character of our political institutions by converting a representative government into a pure democracy. But such is not the view which we have taken of the provision in that act. We can discover nothing in it which bears even a semblance to a delegation of legislative power. The only operation of that provision is to obtain, in a perfectly legitimate mode, the expression of the will of the constituent as a guide for the action of the representative. Is there anything in this violative of the principles of republican government, or abhorrent to our ideas of popular rights? Indeed, if there be one principle of government more jealously maintained——one more earnestly insisted upon—one of more universal acceptation than another—it is that "the representative is bound by the will of the constituent." This principle constitutes the foundation of all representative governments; and there are those now on the stage of action who vividly remember the shock that was given to the popular mind when a

high functionary of the Federal Government, some years since, gave utterance to the sentiment "that the arm of the representative ought not to be palsied by the will of his constituents." We have looked into the act critically, with a view to ascertain if it is in fact obnoxious to the objection under consideration. After authorizing the Board of County Commissioners of any county to subscribe for the stock of such railroads as are therein referred to, the act contains a proviso in these words: *"Provided,* It shall be first submitted to the vote of the legal voters of said county, city or town, to be held and taken at such times and places and in such a manner as said authorities respectively may appoint, whether or not stock shall be taken; and, if when the vote be thus taken, it shall appear that a majority of the voters shall be in favor of such subscription, it shall thereupon be lawful for the Board of County Commissioners, city or town authorities, by agents by them appointed, to subscribe and take in such company such an amount of stock as they shall determine." It will be readily perceived, by a close attention to the phraseology of this proviso, that even should the vote be favorable to the subscription, there is no *express* mandate in it making it the duty of the commissioners to subscribe. So far as the *letter* of the law is to determine its operation, it is very clear that a *discretion* is still left with them to refuse. How far, in this particular, the *spirit* of the law shall control its letter, we do not undertake to decide, or even to intimate an opinion. But, be this at it may with regard to the *act* of subscription, we think there can exist no reasonable doubt but that *the amount* of subscription is still within the discretion of the Board of Commissioners, unaffected by the vote of the people. If we are correct in this construction, then it results undeniably that the vote contemplated by the proviso can, in no proper sense, be

deemed to be an act of legislation. As upon the points hereinbefore discussed, we have upon the one now under consideration an array of precedents which conclusively settles the lawfulness of such a submission to the popular vote, whether it be objected to as "the delegation of legislative power," or as an act of "conditional legislation."

In the case of Police jury vs. Succession of McDonough, before referred to, this very point was discussed and settled. The court say: "Is such a submission really inconsistent, as was suggested at bar, with the genius of our institutions? If the Legislature could constitutionally confer on the Police Jury authority to pass a taxing ordinance, it would seem rather a safeguard against oppression, than the reverse, to qualify the power of requiring it to be exercised, with the approbation of a majority of those who are to bear the burden."—(Citing De Tocqueville, p. 65; White's Dig. of the Laws of Mass., 1147; 2 Gill's Reports, 19; 7 vol. West, L. J., 22; 8 Barr, 395; 10 Barr, 216.)

The same point arose in the case of the Cincinnati, Wilmington and Zanesville Railroad Company vs. the Commissioners of Clinton County, hereinbefore referred to, and it was similarly decided in favor of the law. In Kentucky, the precise point was ruled in the case of Talbot vs. Dent., 9 B. Mon., 526, and afterwards affirmed in the well considered case of Slack vs. The Maysville and Lexington Railroad Company, decided in 1851 and reported in 13 B. Mon., 1. This precise point has frequently been before the courts in all its various phases, and, with scarcely an exception, has been uniformly ruled in favor of the law. But, if further authority be deemed necessary to put the question at rest, we refer to the concurrent action of the Federal Government and the State of Virginia with regard to the retrocession of the county of Alexandria, in

the District of Columbia. The act of Congress of the 9th July, 1846, submitted the question of a retrocession to a vote of the qualified electors of that county. Virginia had previously enacted a law signifying her willingness to receive back the county whenever the Congress of the United States should see proper to retroceed the same. Congress enacted the law of the 9th July, 1846, submitting the question of retrocession to the qualified voters of the county, providing the machinery for the election, and enacting, that if a majority of the voters should be against accepting the provisions of the act, it should be void and of no effect; but if a majority should be in favor of accepting, then it should be in full force; and, in that event, it should be the duty of the President to inform the Governor of Virginia of the result, and that the law was consequently in force. After stating the facts of that case, the Supreme Court of Pennsylvania forcibly remarks: "Many of the most profound constitutional lawyers of the Union were in Congress at that time, and the State of Virginia never hesitated to accept the retrocession, because the Congress of the United States delegated to the people the decision of the question. This act, under all the circumstances, must, therefore, be considered high authority as a precedent in the development of the constitutional functions of the legislative power."

It was further objected against the validity of the act of our Legislature, that by the terms of the 22d section, it was provided that each tax payer of the county should receive a remuneration in the shape of stock in the Railroad Company, equivalent to the amount of his assessment, and the position was assumed that this provision was a clear infraction of the 1st and 14th clauses of our "Declaration of Rights" which were intended to secure to the citizen, the right "of acquiring, possessing and protecting property."

Fortunately for us, this is not a point now for the first time to be decided. It has been made in several of the many Railroad cases which have arisen in the States of the confederacy, and has uniformly been adjudged in favor of the law. Without indulging in an argument of our own on this point, we will content ourselves with short extracts from the opinions in the two cases of "Police Jury vs. succession of McDonough" and Talbot vs. Dent, before referred to in this opinion.

In the first of the above named cases, the court say:— "the objection made to the law upon the ground that the stock subscribed for by the respective police juries is to go to the tax payers, as provided in section 4th, seems to us untenable. In the understanding of practical men, surely this is no grievance. Its manifest object was to lessen the burden of the tax-payer. If the stock should prove worthless it imposes no additional burden upon the holder; it involves him in no further responsibility. But if the stock should prove valuable, such value would be so much taken from the tax."

In the case of Talbot vs. Dent, the Supreme Court of Kentucky says—"It is true it is somewhat an anomily for the governing power to levy a tax for a particular purpose and at the same time, in a measure, reimburse him by the transfer of the thing paid for by that tax; still if the government were under a valid obligation to pay, and had the right to meet this obligation by a tax upon its citizens, a contribution rateably assessed and levied for this public object, upon all the property of the citizens, would not lose its character of a tax, nor be less obligatory upon individuals, because the payment of it would entitle them respectively, to corresponding portions of the thing for which the government had contracted the debt or obligation, for the discharge of which the contribution was required." These

views are so logically and forcibly expressed, and the matter placed in so simple a light, that we deem it a work of supererrogation to add to them.

It was further objected at bar that the provision contained in the 22d section of the act of 1855, which authorized the counties to issue bonds for the purpose of raising the money necessary to pay for the stock purchased, was an infraction of the 13th clause of the 13th article of the Constitution, which expressly prohibited the General Assembly from pledging the faith and credit of the State, to raise funds in aid of any corporation whatsoever. The argument was this, that the letter of the clause confined the prohibition to the State only, yet its *spirit* made it applicable to, and equally binding upon the counties. We have before declined to determine how far a restriction, plainly applicable to the exercise of power by the Legislature, shall be taken to affect the county, but for the sake of the argument are willing to admit the position assumed, viz: That all the restrictions of the constitution which are expressly applied to the legislative power of the State, are equally binding upon the legislative powers of the counties. With the full advantage of this admission, however, we do not see that the objection urged is at all strengthened, for there is nothing in the provisions of the section referred to that authorizes the Board of County Commissioners to "pledge the faith of the county to raise funds in aid of any corporation whatsoever." By an attentive reading of that section it will be seen that the bonds therein authorized to be issued, are not intended to raise funds "in aid of the corporation," but expressly to provide the means by a disposal of the same, *to pay for the stock so to be purchased,*— And it is equally apparent, that the authority to "pledge the faith and resources of the county," is to give credit to those bonds only, and not for the benefit of the company,

or for any other purpose whatsoever. We think therefore that the objection, however, forcible it might be in the state of case assumed, does not apply to the law now under consideration.

We have thus, at some length, gone over the several objections alleged in argument against the validity of the particular section of the act referred to. We have given to the objections and to the arguments in support of them the most deliberate consideration. We have taxed to the uttermost extent all our powers of discrimination. We have resorted for light to all of the decided cases within our reach. We have scrutinized with anxious care and attention the powerful reasoning of the many able jurists, whose opinions are to be found in the books of reports, to discover, if we might, the great *desideratum*, truth; and, after the most laborious investigation, we are constrained to pronounce the particular section of the act in question to be perfectly compatible with the provisions of the Constitution and therefore valid,. If we should have erred in this conclusion, it will present an extraordinary instance of a most singular fatality attending the adjudication of a great constitutional question; for, it may be noted as a pregnant fact, that as often as the questions involved in this case has arisen for adjudication they have received but one determination, and that in accordance with the conclusion arrived at in this case. The courts of Virginia, Massachusetts, Connecticut, Pennsylvania, Ohio, Kentucky, Tennessee, Mississippi and Louisiana all hold the same uniform language upon this subject; and if there be a single adjudication in opposition to our conclusion, as announced in this case, we have failed to have it brought to our notice. In the face of such an overwhelming and imposing array of authority, it would indeed have been most extraordinary, even if our own reasoning had tended

to conduct us to an opposite conclusion, not to have raised in our minds a serious *doubt* as to the correctness of that reasoning; and we are taught by the lessons hereinbefore inculcated in regard to the appropriate function of the judiciary, that whenever, in the examination of a great constitutional question involving the exercise of powers by a co-ordinate branch of the government, a rational doubt arises as to the validity of any particular act of that department, a proper and respectful regard and deference for the same would dictate an affirmation of the act. In the beautiful and forcible language of an eminent jurist, before referred to, "If a court, in such a case, were to annul the law while entertaining doubts upon the subject, it would present the absurdity of one department of the government overturning in doubt what another had established in settled conviction, and to make the *dubious constructions* of the judiciary outweigh the *fixed conclusions* of the General Assembly."

In order, however, to break the force and weaken the authority of the decided cases, it was suggested at bar that those cases were adjudicated under constitutions essentially differing from ours; that the restrictions upon the legislative power to be found in our Constitution are more stringent than those imposed by any of the Constitutions of the several States where those adjudications have been made, and that, therefore, they ought not to be considered as authority in this case.

We have carefully examined the several State constitutions alluded to, and have not found that difference to exist, which is contended for. In the majority of them, we find the restraints upon the legislative department equally stringent, with those imposed by our own; and in several of them, they are even more stringent.

Let the decree of the Chancellor be affirmed with costs.

BALTZELL, C. J., delivered the following dissenting opinion:

Differing with the majority of the court in their views expressed in this case, I proceed to give the reasons that operate with me for holding the adverse opinion. The county of Leon has imposed a tax to pay a subscription of stock to this company, which is complained of as unconstitutional. By express provision of the Constitution, the principles established in regard to State taxation are made to apply to the counties when imposing taxes. Art. 8, sec. 4, Cons.

Those principles are declared to be "equality and uniformity in the mode of taxation."—Sec. 1. 2ndly, "That no other or greater amount of tax or revenue shall at any time be levied than may be required for the *necessary expenses of government.*"—Sec. 2. Thirdly, "No money shall be drawn from the treasury but in consequence of an appropriation by law, and a regular statement of the receipts and expenditures of all public monies shall be published and promulgated annually with the laws of the General Assembly."—Sect. 3. 4thly, "The General Assembly shall not pledge the faith and credit of the State to raise funds in aid of any corporation whatever."—Act 13, sec. 13. 5thly, "Private property shall not be taken or applied to public use unless just compensation be made therefor."—Art. 1 sec 14 6th. "The General Assembly shall have power to authorize the counties and incorporated towns of this State to impose taxes for county and corporation purposes respectively, and all property shall be taxed upon the principles established in regard to State taxation."—Art. 8, sec. 4.

These obviously provide a system and mode of action for the government, and regulation as well of the Legisla-

ture as of cities and counties. They impose upon them a duty of imperious and important character. They are in the first place, before imposing a tax, to ascertain the *"necessary expenses"* to which the State, city or county may be subject, so as not to levy "any other or greater amount than may be required." When collected, the money is not to be withdrawn from the treasury except by appropriation; and, as a still further security, they are all to publish statement of their receipts and expenditures.

It is not required of me, I trust, to define the terms *necessary expenses.* They are clearly restrictive to an authority confided. They are terms of art, phrases well known in law in their application to trustees (the relation and capacity which the Legislature and these city and county officers hold to the people) as well as to executors, guardians and other officers. And their familiar use is in strict accordance with their legal acceptation. No one confined to *necessary expenses* regards himself at liberty to expend as largely as he would if relieved from such restraint.

Passing by the general question of the right of a county to construct a railroad, to be discussed hereafter, the question arises whether the construction of this railroad is a necessary expense of the county of Leon? If it be so, then the law is in strange conflict with itself. It leaves to the option of a majority of the citizens to say whether the expenses shall be encountered—not that they are necessary. Now, this very option and choice is irreconcilable with the idea of necessary expense. If it was a fair expense, a necessary expense of the county, there was no option about the matter, and the Legislature should have directed peremptorily the discharge of the duty, and indeed, without a special law, the county authorities should have provided for it under the general authority confided

to them. If a necessary expense, there was no permission required, no sanction needed. Can a trustee refuse to meet a necessary expense of the trust confided to him; an executor of his estate; a guardian or parent a necessary expense of his ward or child? Is it at the option of any of these to refuse to meet a necessary expense, to provide for or reject it at pleasure? It may be requisite, in case of unnecessary expenses, to ask such permission. In case of necessary expenses there is none, and courts invariably compel their allowance and payment.

A still more definite enquiry is presented on this point.

By referring to the original charter of this company passed in 1853, we find that they have authority to construct a road "from the city of Pensacola or any other point or points on the waters of the Pensacola Bay in Florida, and running thence in an easterly direction to the western or southern boundary line of the State of Georgia." By an amended charter in 1855, they have "power to build an extension of their road to a junction with the Florida, Atlantic & Gulf Central Railroad, at or in the vicinity of Alligator, Columbia county, and in case of their failure to construct their road to Alligator by the time the Pensacola and Georgia Railroad constructs its to that point, then to the most practicable route to Jacksonville on the St. John's river with an extension from a suitable point in Columbia county in a southern or southeasterly direction, to a suitable point of junction with a road which may be built from Amelia Island, on the Atlantic to the water of Tampa Bay in South Florida. Also an extension to Crooked River at White Bluff on Apalachicola Bay in Middle Florida, and an extension to the waters of St. Andrews Bay in west Florida, also travel roads to the County Sites of Jefferson, Gadsden, and Jackson counties, and to the Alabama

line from suitable points West of the Alabama river."—Now will it be said that the construction of a road between the points here designated, (for this is the true question in the case,) is a necessary expense of the County of Leon.—It is not perceived what necessity there is of a citizen of the county of Leon to have a road to and from these various points to Pensacola, to the Georgia line, to Alligator, to Jacksonville, to Tampa, to St. Andrews Bay, to Apalachicola Bay, and to the Alabama line. Could he desire to transport himself or his cotton or other produce over such routes? A road without any beginning or end—a road with its work commenced in the middle, pointing by its charter for its termini to the four points of the compass, but with no distinct indication where it is to go, where to begin, or where to end. And this is a necessary expense to a county having already without taxation, a railroad of only 20 miles in extent to the Gulf, giving her immediate and direct connection at all seasons of the year by steamboats and ships with every part of the civilized world.—Having unexampled advantages for transportation already secured, it is yet a necessary expense to get other communication, more expensive and more distant.

The expense of the construction of this road to these points, will probably reach 10 millions of dollars, yet to meet this necessary expense, the county has subscribed $100,000, a hundredth part of the sum required.

If a necessary expense of the county, why is it that she does not execute the work through her own officers? Why is it not her enterprise? Why does she not control, direct, supervise and manage it? Why not employ agents and workmen, pay and discharge them? If a necessary expense of the county, there is a commensurate liability. The very fact that others own the road and its appendages, have the superintendance, control, management and direction with-

out responsibility to the county authorities for disbursement of the funds, or failure to accomplish the work, or for employing incompetent agents, shows that it is an expense of others and not a necessary expense of the County of Leon.

To sustain the constitutionality of the law, the majority of the court quote from Kents commentaries an interpretation of the word "necessary." This is not the logic of Chancellor Kent. The whole passage is taken almost verbatim from the opinion delivered by the Supreme Court of the U. S. in the case of McCullough vs. the State of Maryland. There, the question was as to the constitutionality of the act of congress establishing the Bank of the United States, which depended upon the grant made by the Constitution of the power to Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing laws," such among others as to regulate commerce with foreign nations—to declare war, maintain a navy, &c. It was in reference to this grant, the Supreme Court held that Congress was not confined in the choice of means, and that the words necessary means such as they thought proper to adopt. But the Chief Justice qualified the opinion with the following remarkable language to which we invite particular attention: "The clause is placed among the powers of Congress *not among the limitations on these powers.*" "Its terms purport to *enlarge* not *to diminish* the powers vested in the Government. It purports to be an *additional* power not a *restriction* on those already granted." Again, "if their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place and would have been expressed in terms resembling these, *"In carrying into execution the foregoing powers, and all others, &c., no laws shall be passed but such as are necessary and proper."* Had the intention

been to make this clause restrictive it would unquestionably have been so in form as well as in effect." McCullough vs. State of Maryland, 4 Cond. Rep. 481.

Except an express decision upon the case itself no language could have been more appropriate, none more decisive of the very points at issue. Here we have limitation, restriction and diminution. The Florida Convention seems indeed to have assumed this identical position as if acting on the very suggestion, only presenting it in more definite, explicit, and emphatic shape. For whilst the Chief Justice admits that if the words "no laws shall be passed but such as are necessary" had been used, they would have limited and controlled the power, the constitution uses language more decided even, "no greater amount of tax shall be levied than may be required for the necessary expense of government;" thus designating in precise language, not only the power to be used, but the special object in reference to which it shall be used, to which object it is strictly limited and confined.

I next proceed to enquire as to the operation of the clause of the constitution marked as the 4th, "that the General Assembly shall not pledge the faith and credit of the State to raise funds in aid of any corporation whatever."

The object of this is very clear, and its design very evident. By preventing the State from creating debts or giving its credit in aid of a corporation, the necessity of imposing taxes on the citizens to pay such debts and thereby redeem its pledge and sustain its credit is avoided. This principle is clearly established as to the State taxation, and we have already seen, expressly applied to the counties and cities. If the question of the execution of bonds and pledging the resources of the counties were for adjudication, it would be difficult to escape the operation of

this provision. As it, however, does not raise and is not presented by the record, I decline the expression of an opinion, content to wait until judicial action may render this an appropriate and lawful duty.

The fifth provision, "that private property shall not be taken and applied to public use, unless just compensation be made therefor," has great weight with me, and but for the authorities holding a different view, I should regard it as conclusive. That the property of the citizen is taken by force of this law is very clear. It is also to be applied to some use, either public or private. It is to be given to the corporation, so that that question arises whether the corporation is public or private. The distinction between public and private corporations is well established, and has reference to their powers and the purposes of their creation. "They are public when created for public purposes only, connected with the administration of the government, and where the whole interests and franchises are the exclusive property and domain of the government. Over these the Legislature has power, not limited by the Constitution, to impose such modification, extensions or restraints as the general interests and public exigencies may require, without infringing private rights. All corporations invested with subordinate powers for public purposes fall within this class and are subject to legislative control. All other corporations are private. They exist by legislative grants, conferring powers, rights and privileges for special purposes. These grants are essentially contracts which the Legislature cannot impair or change without the consent of the corporation." Ang. & Ames' Corp., 927-'28; Dart. Col. vs. Woodward, 4 Wh. 578.

This corporation is then a private one, and money or property of the citizen taken and applied to its use is appropriated to a private use, and thus a question of most

serious import arises, whether the property of the citizen may be taken by the State and applied to the use of some other private party. On this subject the highest tribunals of the country and most eminent jurists have expressed themselves in emphatic language. The Supreme Court of the United States say "that government can scarcely be deemed to be free where the rights of property are left solely to the legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority or ought to be implied from any general expressions of the will of the people" 2 Peters 656 It has never been allowed (says a distinguished member of the Court of Errors of New York) to be a rightful attribute of sovereignty in any government professing to be founded on fixed laws, however despotic the form of government might be, to take the property of one individual or subject and bestow it upon another. The possession and exertion of such a power would be incompatible with the nature and object of all government; for, it being admitted that a chief end for which government is instituted is that every man may enjoy his own, it follows necessarily that the rightful exertion of a power by the government taking arbitrarily from any man what is his own, for the purpose of giving it to another, would subvert the very foundation principle upon which the government was organized and resolve the political community into original chaotic elements." 18 Wendell, 56.

Now, what great enormity, under the pretext of legal

McCants, Partridge, Read of Leon, Robbins, Roache, Sanchez, Semmes, Thompson, Watts, Webb, Westcott, White, Williams, Wood, Wright and Wyatt—30.

So it was *not* stricken out," p. 66.

Mr. Read of Leon gave notice that on the third reading of this article he should propose to amend the 5th section by adding "unless by the concurrent vote of two-thirds of the General Assembly."

"Mr. Thompson moved to amend the 7th section, (now section 4 of article 8,) by striking out in the 4th line, the words "according to its value" which was concurred in; page 60. The section stood in the report, "all property shall be taxed according to its value, upon the principles established in regard to State taxation." "

The necessity of such action on the part of the convention is to be found in the history of the times, showing conclusively that it did not originate in a mere abstract theory of government, but from imperious necessity, induced by the results of bitter experience. The years 1835,-6,-7,-8, were periods of unparalleled suffering, embarrassment and distress throughout the United States. The several States of the Union with scarcely an exception, were involved through extravagant appropriations, wasteful and improvident expenditures, augmented by the aid afforded through Legislative action to individual and corporate enterprise. Their indebtedness on this account amounted to millions of dollars, threatening bankruptcy to them and ruin to individuals. The territories did not escape the common calamity. Florida, with her limited means, sparse population and limited resources having scarcely the semblance of a treasury had issued bonds in favor of Banks to the amount of near four millions of dollars, pledging her faith, credit and resources, for their redemption.

All these events and consequences had occurred before

the convention assembled, had been the subject of discussion through the press, in the Territorial Legislature and before the people, and had entered largely into the canvass for delegates to the constitutional convention. Its journals show that body was occupied with this subject, which more than any other engrossed its attention. To prevent by timely precaution, directed to the evil, the recurrence of such consequences is the manifest spirit, purpose and design of the provisions we have cited. Whether the object has been effected by the remedy proposed depends upon the just construction of these provisions, some of which remain yet to be considered.

It has already been seen, that by the Constitution "the General Assembly had power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively, and all property shall be taxed upon the principles established in regard to State taxation." Article 8, sec. 4.

This clause is peculiar in its provisions—special, not general—is not a grant of power merely, but a grant connected with a designation of the mode and manner of its exercise and of the very object and purpose for which it is to be used. "The Legislature shall authorize the counties to *impose taxes;*"—not borrow money—not issue bonds—not pledge the faith and resources of the county. Nor is this grant sufficient in affording the means to accomplish all the purposes for which it was designed. It was fully adequate and undoubtedly sufficient, through economy and prudence in the administration of the local affairs of the county, to attain the end desired, and, beyond this, a further object of great concern—to prevent waste extravagance and profligacy in expenditures This economy and prudence may be insured by strictly confining the power of taxation to necessary expenses but to authorize or permit debts to be

incurred or loans to be contracted would inevitably lead to the very result which it was the anxious wish of the Convention to prevent and avoid.

Nor can the power to borrow money be fairly inferred from a grant to impose taxes. This latter power "to lay and collect taxes, duties, imposts and execises, to pay the debts and provide for the common defence and general welfare of the United States" was expressly given to Congress by the framers of the American Constitution, yet the power *"to borrow money on the credit of the United States"* was added. Sec. 8, Con. U. S.

If not admitted, or even regarded as doubtful, in the case of a government of the vast powers of the United States, how can such a power be implied for a mere corporate functionary, intrusted with subordinate duties only, almost wholly ministerial and executive in their character, indeed but slightly elevated beyond those of a commissioner of public roads. That the power would result as an incident—as in the case of the Legislature of a state, unrestricted in its high duties by constitutional regulation—is certainly unsupportable on any ground of right, reason principle or authority. The right to borrow and make obligations is the act of a principal, not of an agent. To give to these functionaries such power by implication, is to alter and change at once the structure and character of their office and its functions. The wand of a necromancer scarcely effects greater, more wonderous and marvellous results. Instead of being charged with the raising a few hundred dollars annually, for repairs of court-houses, jails, bridges, &c., these authorities at once become a manufactory of bonds creating debts to the amount of hundreds of thousands of dollars, for which the property of the citizens is mortgaged for payment. Surely there is no hazard in saying that the Convention never contemplated

nor authorized such action, and the language used by them gives neither warrant nor authority for its exercise.

Passing from this position, we perceive that the tax imposed by a county must be for a county purpose. Is the construction of this road a county purpose of the county of Leon? The court very frankly admit that the term "county purpose," as understood by the convention, had reference to "the erection of court-houses and jails, the opening and maintaining of thoroughfares, by opening roads, building bridges and causeways, and keeping the same in repair, licensing and regulating ferries and toll-bridges," &c., &c., yet say "that the counties should not be precluded from availing themselves of the benefits resulting from the most magnificent discovery of the age." Conceding that on the score of utility, they should have this power, this by no means establishes the constitutional right to it. If the convention did not give the power, how is it derived, the convention alone being competent to grant it and the constitution the authority under which it must be exercised? Can it be that the Legislature is authorized to confer the power and the court to sustain it, under the vague allegation that the counties should "not be precluded from its exercise?"

To allow the power, is indeed to amend the constitution so as to give the counties in addition to their ordinary functions the right to tax "to secure the benefits resulting from magnificent discoveries." But there is not plausibility even in such position. Railways and roads were in existence in the early part of the seventeenth century. The application of steam with success to carriages, which is the important matter as far as this case is concerned, was conceived at a later period, in 1784. Previous to this time animal power had been used on such roads. The Railroad from Tallahassee to St. Marks had been in operation some

time before the session of the convention. There is a consideration beyond this. How can it be maintained that a discovery in mechanics, repeals and overturns an important constitutional principle, nay a positive and peremptory restriction and denial of power? This would be in effect to make discoverers in science or mechanics, the framers of the fundamental law, and invested with the large power of its amendment. The court does not see why if a county can construct a common road "this particular species of thoroughfare, is withdrawn from the interpretation of the phrase county purposes." With due deference, this presents a very imperfect view of the subject. It is not the power to make a road that is complained of. This is but one of very many means to an end and object, that object being the transportation of freight and passengers for pay, not by the county, but by private individuals using the money of the people of the county. The county authorizes this company to use the means raised by taxation, for the construction of the road, the making of warehouses, &c., the purchase of cars for passengers and freight, the employment of agents and superintendents, to make the road and use it afterwards for freight, &c. A city may pave her streets with boards, iron, or stone, so that the transportation of freight or passengers may be as easy as on a Railroad. She may even make a railroad in all her streets. Can she purchase and own cars and locomotives and wagons to carry and transport freight and passengers for pay? When the Cumberland road was constructed by Congress no one dreamed of proposing to have agents to run stages and wagons by government. Obviously this is a private occupation, and a franchise and right as dear and as much entitled to regard as any other under the constitution. The duty of the government is to protect the citizen in his occupation, not destroy it by setting up a rival interest. A

planter having cotton or other produce to export, a merchant with goods, has a clear and indisputable right to his own mode of transportation, to his own wagons, and cannot be forced under the pretext of taxes, assessed in support of government, to buy other means of conveyance to belong to others, and to be used to the exclusion of his and maintained at his cost and expense.

No man in our free country, however limited his means, would withhold his proportionate contribution from the support of government. This sum is paid by him with cheerfulness and pride as the price of personal security, the protection of liberty, property and life—a tribute freely rendered in evidence of the high estimation in which the citizen holds constitutional rights and the benefits and blessings of free government. This sentiment it is certainly the policy of all governments to cherish as the surest guaranty of the loyalty of the citizen and of its own stability.

The subject of county purpose has yet another aspect. The direction in which the road is to be constructed agreeably to the charter has already been adverted to. Fairly considered, it would seem to be the work and purpose of the State, and not of a county, and especially of the county of Leon. Its extent, in its boundary, is only about thirty miles—through the State not less than five hundred. Its cost from four, five to ten millions—utterly beyond the means of the county—the direction of the road utterly at variance with any purpose of the county of Leon. If her commerce is desired to go to Fernandina, a road will not be wanted to the Georgia line. If to Pensacola, not to the Alabama line, and so as to other points. There may be design to build a road somewhere—to some of these points—in some direction—but I cannot feel myself justified in asserting that the road indicated by the charter is

a purpose of the county of Leon, in the sense contemplated by the Constitution. Nor is it sufficient, in the view I take of the subject, that some part of the road may be constructed, or that a road may be constructed within the limits of Leon county. The subscription is for the building of the road authorized by the charter, and there is no restriction upon the power of the directory to use the money of the people of Leon at one place more than another. They can apply it at Pensacola, at St. Marks, at some point on the Alabama or Georgia line, at St. Andrews Bay, or elsewhere, as they please.

But it is contended that the majority of the county, having by their vote sanctioned this assessment, this should be held conclusive. If the law is prohibited by the Constitution, as we think has already been established, the sanction of all the people and all the authorities of government, except in the mode prescribed by this instrument will not avail. This is the very essence of a constitutional form of government. "A Constitution is a form of government instituted by the people in their sovereign capacity, in which just principles and fundamental law is established. It is the supreme will of the people, permanent and fixed in their original unlimited and sovereign capacity, and in it are determined the conditions, rights and duties of every individual of the community. From the decrees of the Constitution there is no appeal; for it emanates from the highest source of power, the sovereign people. Whatever condition is assigned to any portion of the people by the Constitution must necessarily be inevitably fixed, however unjust in principle it may be, until revoked by the same sovereign power. A legislative act is the will of the Legislature, and the Constitution is their commission, and they must act within the pale of their authority." Smith Com. on the Con., 313.

To say that the people of Leon county, even in a matter of their own exclusive interest, can, by mere vote, alter and change or disregard the paramount law is to give to them a power which the people of the entire State do not possess when exercised in this form.

It was admitted in argument, and the majority of the court in their opinion do not contest the concession that the Legislature of the State cannot rightly exercise such power, cannot issue bonds for such purpose, nor impose a tax of the kind. It is said to be different with the counties and cities. If the provisions of the Constitution on the subject were referable alone to the *State*, this would of itself, in my mind, raise an insuperable objection to the exercise of the power by the counties. What! the State may not tax and yet the counties may! The State may not issue bonds, yet may impart a power she does not possess! The grand council of the whole State—entrusted with the high powers of sovereignty, of life and death—with the protection of life, liberty and property—cannot approach the citizen with a demand in the shape of tax for such purpose, but a county commissioner may, and so may a corporation! The State cannot use her sovereign power through her sheriff and *posse comitatus*, her military with the sword and musket, to collect for such purpose—cannot punish the citizen for resisting the collection of such tax—but a county and city officer may! A whole may not do an act, but a mere fragment may! An inferior may be trusted, the superior may not! It is thus a power is given to the less which was denied the greater, virtually making the parts superior to the whole. Extravagance, waste, oppression and corruption, perversion of the fundamental law of the principles of justice and good government may be tolerated in the one, but not in the other. Such is the very insecure and unstable

foundation upon which such propositions rest for their support.

I will not offend the memory of the departed, nor depreciate the worth of the living, by presuming that whilst the convention imposed the most rigorous constitutional restraints upon the legislative department of the government in the assumption of unlimited sovereignty, of which that body might otherwise have been the repository, that yet they reposed this high prerogative in subordinate authorities, in nearly a hundred petty sovereignties to exercise this very power in a far more exceptionable and dangerous form and thereby to involve the community in the very injurious consequences which they had so anxiously endeavored to avoid. No! having been a member of that body and a witness to the patriotism and intelligence of my contemporaries, far be it from me to say that they failed, utterly and entirely in the accomplishment of one of their chief aims—a main object and end of their exertions. Although opposed at the time to the action of the majority, I will yet do justice to their sagacity and foresight by admitting my own mistake in the correct application of the great principles they established.

The only possible ground upon which such power can be supported is, that the provisions quoted in reference to State taxation, are not principles of the constitution.—Yet how utterly baseless is such position. Why were they inserted in the constitution unless as rules of government, as guides, as the fundamental law? They are in the very terms, and in the language of provisions, designed for the protection of the liberty and property of the citizen from the earliest dawn of civil liberty. "No freeman shall be deprived of his life, liberty or property but by the law of the land," and the bill of rights of the constitution, the great Magna Charta of the State, has twenty-five of these

provisions, mostly negative and restrictive in their character, like the clauses under consideration.

It is very obvious that the court has considered itself bound by decisions made in other States which they designate as "an imposing array, indeed, as overwhelming authority." A more careful consideration of these would, I respectfully submit, have relieved the case from this difficulty. The decisions quoted are based upon the absence of restrictions in the Constitutions of the States to impair or lessen the general grant of legislative power.

The decision in Connecticut is a sample of them all.—The court says "we have been cited to no express constitutional provision with which the resolution under consideration is supposed to conflict, except it be article 1, section 2, of the State Constitution, the property of no person shall be taken for public use without just compensation therefor;" 15 Connecticut, 501. So in Kentucky, "it would be difficult, perhaps impossible to define the extent of the Legislative power of the State unless by saying, that so far as it is not restricted by the higher law of the State or Federal Constitution, it may do anything which can be effected by means of a law," p. 22. Again, "we find no clause or principle in the Constitution which can be brought to bear directly in restraint of this power, (the Legislative,) but that which declares that no man's property shall be taken for public use, without his consent, unless just compensation be made, &c." Nor is this without qualification. "The limit imposed to this clause of the Constitution can only consist in the discrimination to be made on what may with reasonable plausibility be called a tax, and for which it may be assumed that the objects of taxation are regarded by the Legislature as forming a just compensation, and that which is palpably not a tax, but in the form of a tax or in some other form the taking of private property for the use

of the public or of others without just compensation. That there must be a palpable and flagrant departure from equality in the burthen as imposed upon the persons or property bound to contribute, or, it must be apparent that persons or their property are subject to a local burthen for the benefit of others, or for purposes in which they have no interest, and to which they are therefore not justly bound to contribute, and that the case must be one in which the operation of the power will be at first blush pronounced to be the taking of private property without compensation, and in which it is apparent that the burthen is imposed without any view to the interest of the individual in the object to be accomplished by it." Slack vs. Maysville R. R. Co., B. Mon. 32.

With this admission, it may be contended with great propriety that plaintiff's case is made out, as fully demonstrated in this opinion. If this is not "the case—of a local burthen for the benefit of others and for purposes in which he, the complainant has no interest"—it will be difficult to find one.

Very obviously the cases cited are applicable to constitutions having no restrictions upon legislative power. The fact is, there could not by possibility be an authority elsewhere in point to a case arising under our Constitution, as no Constitution of any other State of the Union has the same restrictions upon legislative power. Arkansas approaches nearest to it, as by a vote of two-thirds of the Legislature they may avoid the effect of the provision of our Constitution as to necessary expenses. With us the provision is absolute and unconditional, and with this difference, was borrowed from the Constitution of that State, made a few years previously. It is a remarkable fact, that after the year 1850 the Constitutions of all the new States were [illegible] in express reference to this very subject—to pre-

vent an abuse of the taxing power. The very courts sustaining the power admit its tendency to wrongful and injurious exercise. Thus the Court of Appeals of Kentucky, in the case quoted, say "we avow, as this court has heretofore done, that we regard the power of local taxation, and especially when exercised or controlled by the local majority, as one *eminently subject to abuses involving injustice and oppression.*" 13. B. Mon., 33.

The new states, Michigan, Wisconsin, Texas, Arkansas, Iowa and California, made their constitutions, and the older states, Ohio, New York, Kentucky, Mississippi, Indiana, and Illinois, amended theirs with most stringent restrictions, principally to attain this end. New York, earlier even than this, amongst others, made a provision of this kind. "The assent of two-thirds of the members elected to each branch of the Legislature shall be requisite to every bill appropriating moneys or property for local or private purposes." Great must have been the incentive, urgent and irresistible the necessity which induced this successive and almost simultaneous movement of the people in so many different States to remedy a mischief, not transient and temporary, but so fixed and deep-seated as to require so radical a change in their fundamental law. It establishes beyond a doubt the important principle that this assumption of unrestricted sovereignty in the imposition of taxes and disbursement of public money, has no foundation in American institutions, and is not fitted to American soil.

When it is admitted that these provisions of our Constitution are so important in their character so operative as to prevent legislative action—when it is seen that they are expressly applied to the counties and cities—where can there be rational or even probable room for doubt? If the Florida Convention had no such design in the adoption of

these provisions, it is respectfully asked what was the end sought by their introduction? Have they no meaning—no purpose—no object? Is our Constitution like that of Connecticut, or Kentucky, Pennsylvania or Louisiana, or Ohio, so that a decision made by their courts is an authority for us?

The words used possess a profound significance and meaning. The space they occupy is not a mere blank, nor are they to be rejected as a dead letter, ineffective and inert, having no existence—a mere sound, signifying nothing. To disregard them, I submit with deference, is to exert a power of repeal and not of construction; and this opinion of the court will inevitably effect what a respectable minority of the convention failed, after repeated efforts, to accomplish by direct motion, to strike out these very provisions.

Great stress is laid upon a decision made in Tennessee, because the Constitution of that State is said to be like ours. Let us determine this. "The General Assembly shall have power to authorize the several counties and incorporated towns in the State to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed upon the principles established in regard to State taxation." 29 sec., 2 art., Cons. Tenn.

"All property shall be taxed according to its value. That value shall be ascertained in such manner as the Legislature shall direct, so that the same shall be equal and uniform throughout the State, and no one species of property shall be taxed higher than any other species of property of equal value." Sec. 28, same Constitution.

Now, the only resemblance here is that of equality, uniformity and according to value; and the tax of counties and cities is to be for county and corporate purposes. There

is no restriction as to necessary expenses—none as to aiding corporations. Unless, then, an adjudication upon a Constitution without restriction upon the legislative power, which, according to the doctrine of its courts, is unlimited, be applicable to a State Constitution having restrictions confining the Legislature in this very respect, then indeed the authority is inapplicable. It is lamentable to observe the slight influence of words to abridge power or to restrain and prevent its doubtful exercise. Let there be line upon line and precept upon precept, yet some means of evasion will be devised, and this tendency prevails in direct ratio and proportion to the interests involved. Not so, however, with a grant of power, which, though ever so vague and indefinite, yet from its inherent propensity of aggrandizement, never fails to discover the most plausable and authoritative pretexts and excuses for any desired extension.

The power of the judiciary to disregard an unconstitutional law is declared in the opinion of the majority to be aggressive, as having been used for mischievous purposes. It is even characterized as a deadly weapon. The authority for so grave an assertion, so serious a charge, is not given. I am confident none exists. I am not aware that any one even in the heat of party excitement has ever before carried his views to such an extreme. What court has committed this grave offence? Certainly not the Supreme Court of this State, that has exerted this power but on one occasion, as far as I recollect. Is it the Supreme Court of the United States that has had greater occasion to bring itself within the reach of the charge than any other?

But is there the slightest pretext or color for any such notion? If the idea of aggression was ever entertained in the wildest dream of any judge, a simple survey of his position would effectually extinguish such sentiment.

A court makes no law controls no means, no monied resources, has no patronage, (in this state does not appoint its own clerks.) The disposition of all these is by the other departments of government. It cannot initiate action in the slightest case; like an arbitrator it acts only as questions are brought before it, and grants or refuses only on such application. Sometimes the legislature or executive obtains its aid to enforce a law or punish for disobedience to one.

At other times the citizen claims its interposition insisting that legislative or executive action is to his injury and that the supreme law of the land, the Constitution, is his shield, and constitutes a protection to him. In such case, the court performs the simple office of deciding which is superior, and when an act of the legislature or the executive is in conflict with the Constitution, it announces the fact and gives efficacy to the supreme law. It is then perfectly clear that the action of the court cannot be aggressive except where it fails to interpose for the protection of the citizen against an unconstitutional invasion of his rights. In such event the court makes itself an accessary by the aid rendered and to this extent will its action, be aggressive. The present case will be an apt illustration if we are right in our views as to the unconstitutionality of the law.

How this action can be justly characterized as a deadly weapon is beyond my powers of conception. If there be serious and fatal consequences attendant upon the exercise of such power by the judiciary, they will arise from the imbecility or want of independence and integrity of its members in the discharge of the important functions confided to them. They can never attach to a faithful and conscientious and independent discharge of judicial duty, for if liberty is to be crushed and freedom to find its grave, an

honest and undaunted judiciary will be found unflinchingly maintainging its post in defence of the Constitution, and perishing only amid its ruins. The deadly weapon will then be found in the hands of its foes, and the fatal wound inflicted by its enemies—the enemies of constitutional liberty and free government.

The importance of a proper exercise and discharge of this duty is illustrated in the impressive language of the sages and patriots of the Revolution, the fathers of the Constitution of the United States, and by eminent jurists and statesmen.

The late Daniel Webster in a debate in the Convention of Massachusetts, thus happily and forcibly expressed himself: "No conviction is deeper on my mind than that the maintenance of the judicial power is essential and indispensable to the very being of this government. The Constitution without it would be no Constitution, the Government no Government. I am deeply sensible, too, and I think every man must be, whose eyes have been opened to what has passed around him for the last twenty years, that the judicial power is the protecting power of the whole Government. Its position is on the outer wall."

The great Patrick Henry, than whom no one was more jealous of power, and who opposed with all his might the Constitution of the United States on account of the large power grants in it, thus expressed himself in the Virginia Convention: "The honorable gentleman did our judiciary honor in saying they had firmness enough to counteract the Legislature in some cases. Yes sir, our judges opposed the acts of the Legislature. We have this landmark to guide us. They had the fortitude to declare that they were the judiciary, and would oppose unconstitutional acts. Are you sure that your federal judiciary will act thus? Is that judiciary so well constituted and so inde-

pendent of the other branches as our State judiciary? Where are your landmarks in this government? I will be bold enough to say that you cannot find any. I take it as the highest encomium on this country that the acts of the Legislature, if unconstitutional, are liable to be opposed by the judiciary."

Chancellor Kent says, "there can be no security for the minority in a free government, except through the judicial department. In free governments, the independence of the judiciary becomes far more important to the security of the rights of the citizen than in a monarchy, since it is the only barrier against the oppression of a dominant faction, armed for the moment with power, and abusing the influence acquired under accidental excitement to overthrow the institutions and liberties of the people." 1 Kent. Com.

Mr. Madison, justly styled the father of the Constitution of the United States, speaking as to the position of the judiciary and the necessity for strengthening it, says: "Experience in all the States had shown a powerful tendency in the Legislature to absorb all power into its vortex. This was the real source of danger to the American Constitution, and suggested the necessity of giving every defensive authority to other departments consistent with republican principles." Debates in Convention, p. 1163.

Governor Morris said, "he concurred in thinking the public liberty in greater danger from legislative usurpations than from any other source." P. 1165.

"As the Constitution is the supreme law of the land, in a conflict between the laws either of Congress or the States, it becomes the duty of the judiciary to follow that only which is of paramount obligation. This results from the very theory of a republican constitution of government; for otherwise the acts of the legislature and execu-

tive would in effect become supreme and uncontrolable, naturally, notwithstanding any prohibitions or limitations in the Constitution, and usurpations of the most unequivocal and dangerous character might be assumed without any remedy within the reach of the citizen. The people would thus be at the mercy of their rulers in the State and national governments, and an omnipotence would practically exist like that claimed for the British Parliament." 3 Story, 428-9.

Such are the views I have entertained on this subject, derived from these eminent sources. They have governed me to the extent of my limited capacity in their application to the present subject. The maintenance of the Constitution, of the great fundamental principles of free government is, in my view, pre-eminently superior to any mere question of expediency or regard for improvements, however important they may be to the welfare of the State. I might lament a restriction which would be detrimental to this enterprise, but for such I am not responsible; the remedy is in other hands. My duty is to declare the law as it is; and, having a clear conviction in my own mind, free from any doubt, there remains the questionable and imperious duty to announce it. I find no necessary expense of the county of Leon—no county purpose, which justifies the levy of this tax. The law is, in my opinion, therefore, palpably unconstitutional.

CORNELIUS GRADY, PLAINTIFF IN ERROR, VS. C. THIGPEN, ADM'R, &C., OF JEAN LABATUT, DEC'D.

1. Entries in the account book of a shop-keeper excluded as evidence where the proof was that they were made in two, three and sometimes four days after the transaction. They should have been made on the same day or the day after.
2. No objection that they were transcribed from a slate.
3. The charges should be definite, stating the quantity and kind of the article and price, and not accumulate and confound prices of different articles.

Writ of error to Franklin Circuit Court.

This was an action of assumpsit instituted on a book account.

On the trial of the case, the plaintiff offered in evidence the book of entries containing the account sued on, to which the defendant by his counsel objected. Thereupon the plaintiff introduced Jacob Lind as a witness, who testified that he had been clerk of Labatut; that the book offered in evidence was the only book kept by Labatut; that when goods were sold by witness or Labatut, they were entered on a slate kept for that purpose; that the entries so entered on the slate were transcribed by Labatut to the book offered in evidence; that sometimes the entries were made from the slate into the book on the same day, and sometimes they were not transcribed into the book from the slate for two or three days, and sometimes four days had elapsed; that he made but few entries in the book from the slate himself—not oftener than four or five times.

Thereupon the defendant objected to the introduction of said book offered in evidence, because the same was not the original book of entries, inasmuch as it was proved by

the witness that the entries were originally made on a slate, which were transcribed into the said book, sometimes on the same day, sometimes in two, three or four days.

The court overruled the objection, and a verdict and judgment were rendered for plaintiff.

D. P. Holland, for Appellant.

It is contended by the appellant, that before the book offered in evidence was admissible and competent testimony to go before the jury, it was necessary for the party seeking its introduction to lay a foundation for its admission by proving: 1st, That the party had no clerk; 2nd, That some of the articles charged had been delivered; 3rd, That the book offered in evidence is the book in which the articles charged in the bill of particulars have been originally made; 4th, That he keeps fair and honest books, and this must be done by disinterested witnesses and adduced to the court; that the party's own oath nor his administrator's, if he be dead, cannot be received to establish the foregoing; that the court, upon the hearing of this testimony, is to decide as to the competency of the book; and the credit to be given to the book itself is afterwards to be determined by the jury.—Laure vs. Rowland, 7 Barbour's S. C., 108; Vosburgh vs. Thayer, 12 Johns. 461.

The statute of this State, passed Dec. 29th, 1854, (see Pamphlet Laws, 7 session, page 65,) it is contended only admits the books as secondary evidence, and if it appears at any stage of the case that better evidence was attainable, the book is incompetent to go before the jury. In the present case, better testimony was attainable; for the witness Lind stated that he was clerk for Labatut at the time, and he ought to have been called upon to prove the sale and delivery of the goods charged, and their prices.—

Thomas vs. Dyott, 1 Nott & McCord, 186; Lamb vs. Hart's adm'rs, 1 Brevard, 105; Eastman vs. Moulton, 3 N. H., 157. Cited in 1 Smith, L. C., page 351.

The book of original entries (even when competent to go before the jury) is not evidence of the price and value of the articles charged or of the services rendered but only of the sale and delivery or of the services rendered, and then only of such items as are within the line and business of the party introducing them; and these must be of those things that are the subject of book accounts, and would not be evidence of money advanced or cash lent.—1 S. L. Cases, page 368 and 361.

The book offered in evidence was inadmissible, because the lapse of time from the entry on the slate to the book was so great that the entries in the book did not form a part of the *res gestae,* such entries cannot be said to have been made contemporaneous with the delivery of the goods. If, then, this is the case, and the entries did not partake of this character, they are not original entries. In Walter vs. Bollman, 8 Watts, 544, an interval of one day between the transaction and the entry of it on the book has been deemed a valid objection to the advisability of the book in evidence. 1 Greenleaf Ev., § 117 and note.

Entries which had been transferred from a memorandum book, some on the first, some on the second and others on the third day after, were held incompetent.—Cook vs. Ashmead—cited in 1 S. L. C., page 358.

In Forsythe vs. Norcross, 5 Watts, 432, where several immediate days had elapsed before they were transcribed, the books were rejected in that case. The entries were made on a slate till it was full, and then after four, five or six days, they were transcribed into the book, and three witnesses of the same occupation swear that this was a general custom, so far as they knew. The court there

say, "An entry on a card or slate is but a memorandum preparatory to permanent evidence of the transaction, which must be perfected at or near the time and in the routine of business, but the routine must be a reasonable one, for there is nothing in the condition of the craftsman to call for indulgence till his slate be full, or till it be convenient, for him to dispose of the contents of it. The entries ought, in every instance, to be transferred in the course of the succeeding day."

If this decision be correct with regard to mechanics, *a fortiori* should it be applied to merchants, because the established rules of business are required of this class rather than of mechanics, and courts of justice should render greater indulgence to the latter class, who have less facilities for book-keeping, whose business does not require that nicety, precision and promptness in making their entries that mercantile transactions demand.

The law cannot fix any particular instance when the entry shall be made; but it must be within such time as to make the entry contemporaneous with the delivery of the goods. And when this is not done and a longer period of time elapses, such entry cannot be held to be an original entry, and this is, in every instance, a subject of enquiry for the court.—Curren vs. Crawford, 4 S. and Rawle.

In the present case, it is evident from the testimony of Lind that the book offered in evidence was not a book of *transactions as they occurred,* but a register of *past transactions.* If the book possessed the latter character, instead of the former, then it was not competent to go to the jury. The book could not have been relied upon with any degree of precision, because the charges on the book were only transcribed from the slate, and without the assistance of the person who made the original charges on the slate, and hence was inadmissible.

T. J. Eppes, for Appellee.

ERROR FIRST:

Either the book *was* one of original entries, *or it was not,* as it stands affected or made otherwise by the use of *a slate.* What was the testimony? The clerk of Labatut was introduced, who stated that Labatut kept correct books; that the book offered in evidence was *the only* book kept by Labatut; but also stated, that a slate was kept upon which sales were entered and thence transcribed *into said book,* sometimes on same day, and in two, three or four days.

AUTHORITIES.—In case of Faxon vs. Hollis, 13 Mass., 427, where a book was offered in evidence, and the plaintiff, a blacksmith, stated that he kept a *slate* in his shop on which he set down all his charges as they occurred, and that he was in the habit of transcribing the entries from the *slate* into the book, then rub out charges on slate and begin anew. *Court admitted the book,* saying, "The entries in the book may be considered *original,* although transcribed from *a .slate,* the slate containing *mere memoranda,* and not being intended to be permanent."

Also see 12 Pickering, 136, case of Smith et al. vs. Sanford, where a butcher took meat around in a cart, and as he sold it *made scores* on the cart, and upon return entered them in book. Book was admitted by the court.

From this it would seem that the *mere* fact of keeping a slate or other memorandum, for the purpose of accuracy, does not make the book less original.

If the entries be made in account book from *memoranda taken at the time* by the party, or by his *assistant,* and intended only to serve as notes to make up the entries more accurately, "the book is an original."—Ingraham vs. Brockins et al., 9 Sergeant & Rawle, 285; Patten vs. Ryan, 4 Rawle, 408.

The fact, then *that witness,* as clerk of Labatut, made some of the entries, is immaterial—does not vitiate.

In the case of Sickles vs. Mather, 20 Wendall, 72, the memoranda were made *by foreman* on a slate, and thence transcribed by plaintiff in a book. "The plaintiff used to take the slate home, sometimes every day and sometimes every *two or three days,* as was found *convenient* for transcribing;" and the court held this no objection.

Mr. Greenleaf, in his work on evidence, vol. 1, p. 155, (note,) remarks: "Whether entries transcribed *from a slate* or card into a book are to be deemed original entries or not is not universally admitted," but adds, that in Massachusetts they are admitted.—Faxon vs. Hollis, 3 Mass., 427. In Pennsylvania *they were rejected* in Ogden vs. Miller, 1 Brown, 147, but continues to say, *they have since been admitted* where they were transcribed *"forthwith"* into the book.

If these authorities are to be relied on, the book offered in evidence below must be deemed *an original,* and not in the least made less so by the use of a *slate.* If, then, it was *original,* the court below acted right in admitting said book to the jury.

This brings us to *error second,* as assigned:

Does the delay of one, two or four days in transcribing entries from the slate into the book vitiate book as evidence or as book of original entries.

In the note just cited from Greenleaf is the word *"forthwith,"* in reference to transcribing entries, and by way of illustration to show how it was used and understood in Pennsylvania, he cites authorities (vide Greenleaf, vol. 1, p. 155,) "as *not* later, &c., *than the evening* of the *second* day," (and cites Ingraham vs. Brockins, 9 S. & R., 285.)

"Forthwith," then, was not understood to mean at the *exact* date or minute of time, but has a more extended

time and signification in this connexion, *to be determined by circumstances.*

Let us look to the authorities for a *rule* upon the subject. As to time of entry, the principle is thus declared in Curran vs. Crawford, 4 Sergeant & Rawle, 3: "The law fixes no precise time when the entry should be made; at or near the time is sufficient." Thus, in Patten vs. Ryan, 4 Rawle, 408, where the plaintiff said she first made the entries on a card and then copied them into book, "either the same evening or the next day, or as soon thereafter as she conveniently could," no *objection* was made on the *ground of delay.* And, in further explanation of word *"forthwith,"* used by Greenleaf, who cites Ingraham vs. Brockins, 9 S & R., 285, I would refer the court to vol. 1 Smith's Leading Cases, p. 357, (top,) Price vs. Earl of Torrington, where said case of Ingraham vs. Brockins (relied on by Greenleaf,) is thus commented on:

"The principle really decided in Curran vs. Crawford and *Ingraham vs. Brockins* is that the court will be guided by the consideration whether the first memoranda were made on such material and with such care and transcribed under such circumstances that the book of entries may be reasonably relied on."

And so in case of Hartly vs. Brooks, 6 Wharton, 189, (1841,) two books of entries were offered. As to one of these, the plaintiff testified that some of the entries were made the *first,* some *the second* day in *the evening,* and that some were taken from *the head,* some from *the slate.* Book was admitted. (The other book was objected to on another account.)

But the principle as *to time* the entries *should be transcribed,* and which supplies the most accurate *rule* on the subject, is thus stated by Justice Sergeant in case of Jones vs. Long, 3 Watts, 325, viz:

"The entries *need not* be made *exactly at the time* of *the occurrence*—it suffices if it be within a *reasonable* time, so that it may appear to have taken place while the *memory* of the fact *was recent* or the *source* from which knowledge of it was derived was *unimpaired.* The law fixes no precise instant when the entry should be made. *If made at or about the time, it is sufficient.*"

And Smith, in his Leading Cases, vol. 1, p. 359, remarks in this connexion: "A *principle* so strongly founded in *good sense* and *so consistent* with what has been decided in other States, cannot be considered *as in any degree shaken* by *loose dicta* in later cases, especially when those dicta have been thrown aside *with utter contempt* by the court that made them.

In the principle stated by Justice Sergeant, above cited, the *rule* applicable *to time* of transcribing can be seen thus: "It must be in a *reasonable* time," and this to be determined or estimated by *either* of two means, viz: The one, "So that it may appear to have taken place while the *memory of the fact was recent.*" The other, "Or the source from which a knowledge of it was derived was unimpaired."

BALTZELL, C. J., delivered the opinion of the court.

On the trial of this case in the court below, the plaintiff, administrator of Labatut, offered to read to the jury, a book of entries as evidence to which defendant objected. Thereupon plaintiff introduced Jacob Lind as a witness, who testified that he had been clerk of plaintiff, deceased; that to the best of his knowledge he kept correct books; that the book offered in evidence was the only book kept by him; that when goods were sold by the witness or plaintiff, they were entered on a slate kept for that purpose; that entries so made on the slate were transcribed by plain-

tiff, deceased, to the book offered in evidence. That sometimes the entries were made from the slate into the book on the same day. Sometimes the entries were not transcribed into the book from the slate in two or three days, and sometimes four days had elapsed. That he made but few entries in the book from the slate himself, not oftener than four or five times. The court permitted the book to be read in evidence, and defendant excepted. The entries read in evidence to the jury are as follows:

C. Grady to C. Labitut,			*Dr.*
July 8th, 1853,		To date	$3 75
		Peck Onions, 100 lbs. Sugar	9 05
		1 gal. Lard Oil and Molasses	2 05
		Liquor bill	1 80
Aug.	5.	2 Chickens, Cognac	1 35
	6.	Potatoes	55
	18.	Tea, 12 chickens	4 35
Sept.	13.	½ doz. Chickens	1 50
		½ barrel Flour	4 25
	30.	Molasses and Lard	1 65
		Onions	25
Oct.	3.	Liquor bill, 28th Aug	12 20
	8.	Tea and Salt, 33, beef	4 28
	13.	Callaghan's order	7 50
		10 lbs. meat	84
	3.	½ gal. Molasses	20
		Liquor bill, Cigars	18 05
			74 12
		Received payment,	7 50
			$66 62

In Hooker vs. Johnson, decided at the recent session of

this court at Tampa, it was held that "the relaxed rule as to the introduction of book accounts, in operation in our sister States, with the restrictions and qualifications attached thereto, should prevail here." Tested by these rules, there seems to be little objection to the evidence on account of the transfer from a slate.—1 Greenleaf, p. 155, n.; 13th Mass., 427; 6th Whart., 189.

There is greater difficulty as to the time that should elapse for the transfer, and there is not an entire agreement in this respect as to a precise time. It is enough, say some of the authorities, that it be made "at or near the time of the transaction."—1 Greenleaf, 138, n. 1; 9 S. & R., 3, 5.

The books should be kept for the purpose and contemporaneous with the delivery of the goods. Not registers of a past transaction, but memorandums of transactions as they occur.—Greenleaf Ev., 137-9, n. 1.

Again, it is said "it suffices if it be within a reasonable time, so that it may appear to have taken place while the memory of the fact was recent or the source from which knowledge of it was derived was unimpaired."—3 Watts, 325.

"When the entries were made at night or the following morning from the memorandum, it was held sufficient."—9 S. & R., 285.

Sickles vs. Mather, 20th Wend., 72, has been quoted to the effect that two or three days was held sufficient but we have not had access to the book containing a report of the case,. An interval of one day between the transaction and the entry of it has been deemed a valid objection.—8 Watts, 344.

There may be cases in which a greater time might be allowed than is even claimed here. This will depend upon circumstances. We see no reason or propriety in allow-

ing a period beyond the day after the sale. This account is by a shop-keeper engaged in the sale of groceries, &c., in a town, which may be supposed to be his sole occupation. What is to prevent entries of sales by him on the same day, or, at the furthest, on the day after. To allow four days in accounts of this character would seem to be an invitation to looseness and irregularity in dealing, if not a direct encouragement to fraud. We hold, then, that the book should have been rejected, and not permitted to be read in evidence. Were the account admissible in the respects just stated, there are other grounds of objection to the greater part of it. The charges are very vague and indefinite—by no means precise—giving neither quantity, quality nor value, but accumulating items with the price in the aggregate. Scarcely an entry is free from this objection.

The judgment of the Circuit Court will then be reversed, and the cause remanded for a new trial to be had not inconsistent with this opinion.

Decisions

OF THE

Supreme Court of Florida.

AT

FEBRUARY TERM, 1856,

Held at Jacksonville.

JAMES CHERRY, APPELLANT, VS. THE STATE OF FLORIDA.

1. When an indictment has upon it the usual indorsement of the title of the case together with a comprehensive designation of the offence charged, this court will, in view of the practice which is known to prevail in the circuit courts, in regard to matters of this kind, view such indorsement as the act of the prosecuting officer, whose duty it is to prepare the bills; and the words of "A true bill," which is the act of the Grand Jury, will be taken to refer to the offence as charged in the body of the indictment, and not to that designated in the indorsement.
2. Such indorsement of the prosecuting officer, is to be received only a memorandum for the convenience of reference, and to distinguish the paper from others of a similar character. It constitutes no part of the indictment--it imparts no vitality, nor does it give any validity to the instrument.
3. The Grand Jury have the right to qualify and limit their finding to any extent they may deem proper, under the circumstances and facts which may be developed in the investigation of the case; but such qualification or limitation must not be presumed. The finding must be taken to be general and referable solely to the offence *as charged in the body of the indictment*, unless it can be reasonably inferred from the collocation of the words, that such qualification or limitation were intended to be made.

4. It will not be permitted to distort the finding of the jury, by forcibly connecting the words of the finding with the incomplete description of the offence, to be found in the usual indorsement of the prosecuting attorney.

5. Every portion of the record that comes up from the Circuit Court is entitled to equal credit; and if implicit credence is to be given to that portion which sets out the finding of the jury, as recorded in the minutes of the court, the same degree of credence is to be given to that portion which connects the finding with, and makes it applicable to the particular bill of indictment set out in the record. Such an *identity* between the record of the finding and the particular bill of indictment, to which it is made to apply, as will leave no room for mistake or doubt, is all that is necessary.

6. The degree of strictness spoken of in the books as applicable to criminal jurisprudence, is such as is conformable to rational principles, and not such as is calculated to defeat the ends of the law.

7. The case of Holten vs. The State, (2 Fla. Rep., 476,) referred to and commented upon.

Appeal from a judgment of the Circuit Court for Duval County. The opinion of the court embraces a full statement of the facts as disclosed by the record.

E. Bissell, Jr., for Appellant.

G. W. Call for Attorney General for the State.

DUPONT, J., delivered the opinion of the court.

The record in this case discloses, that at a term of the Circuit Court of Duval county, James H. Cherry, the appellant, was indicted, tried and convicted for the statutory offence of "living in a state of fornication with a colored female." The indictment is set out in extenso, and upon it are the following endorsements, viz:

"The State of Florida vs. James Cherry:—Fornication with a colored female."

"A true bill. COLUMBUS DREW.
Foreman."

The record of the finding of the Grand Jury, as exhibited by the minutes of the Circuit Court, is in the following words, viz:

"And now, on this 24th day of March, A. D., 1855, came the Grand Jury into open court and made the following presentment, to wit:

The State of Florida
vs.
James Cherry.
} Fornication with a colored female. A true bill."

Immediately after the conviction a motion was made to arrest the judgment upon the following grounds, to wit:

1st. That it does not appear by the record in said cause that the grand Jury found therein any true bill against the defendant for any offence against the law of the State.

2nd. Because it does not appear by said record that the Grand Jury found in said case a true bill against the defendant for the specified offence described in the indictment and given in charge to the Petit Jury upon the trial.

3rd. Because it does not appear from the record in said cause that the Petit Jury found therein the defendant guilty of any offence against any law of this State.

4th. Because it does not appear from said record that said Petit Jury found in said cause the defendant guilty of the specific offence described in the indictment and given in charge to them.

5th. Because the indictment does not contain a specific description of the female with whom the offence is alleged to have been committed.

6th. Because the record, indictment and proceedings in said cause are in these and other respects defective, informal and insufficient.

The motion in arrest of judgment was overruled by the court below, and the propriety of that ruling is now presented for our determination.

In the argument before this court two positions were assumed and insisted upon by the counsel for the appellant: first, that neither the record nor indorsement show

any offence known to the laws of this State; Secondly, that the said record and indorsement do not show the particular offence mentioned in the body of the indictment. Both of these propositions may be considered under one and the same head; for if either of them should be true, it is fatal to the conviction, and the judgment would, consequently, be reversed.

It was insisted in argument, that the indorsement of the words "fornication with a colored female," which appear upon the indictment, shows that the Grand Jury intended and did find the bill which was laid before them to be "true" only *quoad* the act of fornication, and negatived the idea that they intended to find it true as to the act of "living in a state of fornication," which is the specific offence designated in the statute, and the one particularly described and set forth in the body of the indictment. To show that a partial finding of this character is of no avail and does not convert the bill into an indictment, various authorities were cited, all of which we recognize as good law.

Chitty, in his work on criminal law, says: "The jury cannot find one part of the same charge to be true and another false, but they must either maintain or reject the whole; and therefore if they endorse a bill of indictment for murder *"billa vera se defendendo,"* or *billa vera* for manslaughter, and not for murder, the whole will be invalid and may be quashed on motion." He also lays it down as a rule that the finding of the jury must be absolute and unconditional, and therefore a finding *"si domus non fuit in possesisone dominae reginae tunc vera"* is of no avail and cannot be made the foundation for any further proceedings. So, if in the case of libel they find *"billa vera,"* as to the words *"sed utrum maliciose, ignoramus,"* for nothing can be done upon such an indictment. Chitty's Criminal Law, 322.

To the same purpose is Archibold in his Treatise on Criminal Pleading, p. 60.

Mr. Wharton, in his Treatise on American Criminal Law, (page 181-2,) recognizes the doctrine as well established, and says: "If the finding be incomplete or insensible, it is bad. Where the Grand Jury returned a bill of indictment which contained ten counts, for forging and uttering the acceptance of a bill of exchange with an indorsement "A true bill on both counts," and the prisoner pleaded to the whole ten counts, and after the case for the prosecution had concluded, the prisoner's counsel pointed this out, the finding was held bad, and the Grand Jury being discharged, the judge would not allow one of the Grand Jurors to be called as a witness to explain the finding."

There being no controversy with regard to these well established principles, we are led to enquire, in the first place, what the Grand Jury did in fact find when they presented to the court the indictment upon which the appellant was actually tried and convicted; and this enquiry very naturally involves the consideration of the effect to be given to the various indorsements which are to be found thereon, as the same are presented by the record.

To hold that by legal intendment every indorsement which appears upon an indictment is the act of the Grand Jury, and to be taken to the expression of their will, would be as dangerous to the salutory enforcement of the criminal laws of the country, as it would be subversive of the plainest dictates of enlightened reason. It would be to substitute a violent presumption for a known fact. It is the duty of the court, in considering a question of this kind to have reference to the *practice* of the prosecuting officers who are charged with the duty of preparing the bills of indictment to be laid before the Grand Jury; and it

will not be attempted to be controverted that there is no practice more universally observed by those officers than that of indorsing upon the bill the title of the case and a comprehensive designation of the nature of the offence charged in the body of the bill, thus

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John Styles. } Larceny.

Now, to say that by legal intendment this indorsement must be taken to have been made by the Grand Jury, would be to require of us to sacrifice the substance to form, and thus, by the merest technicality, (the disregard of which can never be attended with any detriment to the person charged,) to defeat the claims of justice. We judicially know that this indorsement is the act of the prosecuting officer, and that it is not the act of the Grand Jury, and, in the face of this knowledge, we do not feel that we should be in the line of our official duty, were we, by a strained technical interpretation, to make the record speak a language which we know to be false. This indorsement is, in fact, no part of the indictment. It is not attested by the Grand Jury as their act. It stands upon the back of the indictment, distinct and separate from the indorsement of the words "A true bill," which is the act of the Grand Jury, authenticated as such by the name of the foreman attached thereto. It is a mere *memoranda* of the prosecuting officer, placed there for the convenience of reference, to distinguish it from other papers of a similar character, and the indictment would be just as valid without as with the indorsement. It imparts no vitality, nor does it give any validity to the instrument. But it was insisted by counsel, that it was to be presumed where a Grand Jury entered upon the investigation of an offence, they had reference solely to the particular offence designated

by the indorsement, and that their finding must be limited to the offence so designated; that they never look beyond such indorsement, and make no reference to the offence as charged in the body of the bill; that if the offence, as contained in the indorsement, is defectively designated, so as to be either *incomplete* or *insensible,* the finding will be bad.

We are clearly of opinion, that the premises upon which the argument is based are false in point of fact, and, consequently, the argument, and with it the conclusion must fail. It is manifestly the duty of the Grand Jury, when called upon to discharge the grave and responsible functions of their high office, to examine, in the first place, with due care and deliberation, the bill which may be laid before them, in order to ascertain the character of the charge. It is not to be presumed that officers of such high dignity, and upon which such mighty responsibilities devolve, will proceed to discharge their duties in a careless or negligent manner. It is true that this body is not usually composed of lawyers; but the law of their constitution has assumed that they are competent to the discharge of their appropriate functions; and a proper deference for a co-ordinance branch of the judiciary would lead us to the conclusion, that in the discharge of those duties they are ever zealous in the observance of a degree of circumspection fully commensurate with the high responsibility of their station. Besides, they have, in the person of the prosecuting attorney, a law officer whose duty it is to instruct them upon all legal points. They also have at all time free access to the presiding Judge for the solution of all legal questions with regard to which they may desire information.

It was further insisted, as a matter of argument, that a defective designation of the offence, as named in the in-

dorsement, might and probably would operate to mislead the Grand Jury into a finding different from that which they may have intended. Such mischief, should it occur, would be clearly referable, not to any want of soundness in the principles which we have laid down for the government of their investigations, but to a disregard of those principles and a culpable neglect of duty.

It is not denied that a Grand Jury have the right to qualify and limit their finding to any extent that they may deem proper under the circumstances and facts which may be developed by the investigation of the case; and the effect of that qualification or limitation will be either to reduce the finding to the lesser offence charged in the body of the bill, or to entirely invalidate it as an *indictment.* In the latter case, it may be viewed as an indication to the prosecuting officer to prepare a bill suitable to the facts of the case. But a limitation or qualification of the finding must not be presumed. The finding must be taken to be general and referable solely to the charge set forth in the body of the indictment, unless it can be reasonably inferred from the collocation of the words that such qualification or limitation were intended. It will not be permitted to distort the finding of the jury by forcibly connecting the words of the finding (as is sought to be done in this case) with the incomplete description of the offence to be found in the usual indorsement of the prosecuting attorney. The argument of the appellant's counsel proceeds upon the assumption, first, that the indorsement referred to is essential to the validity of the indictment, and secondly that as an essential part of the indictment, it should, to be good, contain a full and complete designation of the offence intended to be charged.

Neither of these positions are we prepared to admit. We have before intimated that the usual indorsement of

the prosecuting attorney constitutes no portion of the indictment, and that the indictment would be as valid were no such indorsement placed upon it. As a mere memoranda of the prosecuting officer, placed thereon for the convenience of reference, it is sufficient that the indorsement contain a comprehensive designation of the offence. Were it otherwise, there are many statutory offences which it would be unsafe to attempt to designate otherwise than by incorporating all the ingredients necessary to constitute a formal and legal charge, and for the accomplishment of which the back of the indictment would not afford sufficient space. As a matter of precaution, however, the designation of the offence in the indorsement ought not to be so foreign from the character of the offence charged in the body of the indictment as to be calculated to mislead the jury in their investigations.

The indorsement in this case, we think is sufficiently descriptive to point with unerring certainty to the particular offence charged in the body of the bill, and that it could not by any probability operate to mislead them.—The act of fornication, though not constituting the entire offence, is, however, the gravemen, and had the indorsement been merely "Fornication," it would not, in our opinion, have invalidated the indictment.

Thus far we have addressed ourselves exclusively to the bill of indictment, with the several indorsements thereon, and the conclusion that we have arrived at is, that it is sufficient both in form and substance to support the conviction had thereon.

We now approach the consideration of another point in the case, which at the first blush would seem to involve an inquiry of greater difficulty, viz: The validity of the [illegible] of the Grand Jury as set forth and recorded *in the minutes of the proceedings of the Circuit Court.* That

Record is as follows: "And now on the 24th day of March, A. D. 1855, came Grand Jury into open court and made the following presentment to-wit:

The State of Florida, vs. James Cherry. } Fornication with a colored female. A true bill."

Standing by itself—isolated and unconnected with the other parts of the record, we greatly doubt whether such a record of the finding would be sufficient, for in the language of the objection, it would be the finding of an offence not known to the law. But such isolation does not exist; the same record that informs us of the character of the finding, also informs us, (by setting it out in extenso) of the particular bill of indictment then and there presented.

Every portion of the record before us is entitled to equal credit, and if we give credence to that portion of it which sets out the finding, we must give the same degree of credence to that portion which connects the finding with and makes it application to the particular bill of indictment upon which the appellant was tried and convicted. The rule which requires the observance of great particularity in the record of the finding, is based upon the principles of enlightened sense, and it is but reasonable that the application of the rule should be subjected to like principles. All that is necessary in a case like this is, that there should be such an identity between the record of the finding and the particular bill of indictment to which it is made to apply, as to leave no room for mistake or doubt. This record, we think, furnishes that identity, and the appellant has therefore had the benefit of the rule.

It has been said by some who contend for a greater degree of strictness, that the record of the finding must be so fully perfect and complete of itself as not to require any extraneous aid in order to establish its identity with and

applicability to the particular offence for which the party may be tried. To demonstrate the unsoundness of this doctrine, suppose that the Grand Jury should return into court at the same time, two separate bills of indictment against one and the same individual—the one for the murder of A. and the other for the murder of B. The usual record of the finding in each case would simply be, that the Grand Jury came into court on a certain day of the term and made a presentment against the party for "murder," without designating for the murder of A. or for the murder of B. Suppose further, that the party is tried and convicted upon only one of these indictments and he brings his case to this court upon a writ of error. By what means other than by a reference to the indictment spread out upon the record could we establish the necessary identity between the record of the finding and that particular indictment? The name of the party murdered is mentioned in neither of the findings and it seems to us that it would be morally impossible to establish the identity without a resort to the indictment itself. This example among many others that might be cited, clearly illustrates the unsoundness, and indeed, the utter impracticability of the doctrine contended for.

But there is another view of the question which to our mind is equally convincing. The same reason that exists for our taking notice of the practice of the prosecuting attorneys with regard to the indorsements which they usually put upon the bills that they prepare for the action of the Grand Juries, equally operates to induce us to take notice of the practice of the clerks with regard to the entry of the findings upon the minutes of the court. We know officially, that it is the invariable practice of the clerks in entering the findings of the Grand Jury, to adopt the designation of the offence contained in the indorsement of

the prosecuting attorney. To shut our eyes to this acknowledged practice, would be to make a solemn farce of the forms of criminal jurisprudence and to subvert the salutary ends of the law. We are not insensible to the rule which require the proper observance of *strictness,* where property, reputation and life are at stake; but the degree of strictness spoken of in the books is such as is conformable to rational principles and not such as is calculated to defeat the ends of justice.

We are aware that in the views expressed in this opinion, we have trenched somewhat upon the doctrines laid down in one portion of the opinion delivered in the case of Holten vs. The State, (2 Florida Reports, 476;) but without intending to impugn the decision in that case, (which upon a consideration of the whole record might very well be sustained,) we may be permitted to express the opinion, that upon this particular branch of that case, the court evidently pushed the argument to an extremity which is sustained neither by sound reason, nor even by the principle of the case cited in its support.

Let the judgment of the Circuit Court be affirmed with costs.

PEARSON, J., dissented.

KELLY, TIMANUS & CO., APPELLANTS, VS. ANDREW WALLACE, TRUSTEE, &C., APPELLEE.

1. The instruction of the Circuit Judge in the case was, that the principal, the person hiring a negro slave, was responsible for his loss through carelessness or misconduct of his agent; again, that if an agent hears that a negro cannot swim, and gives an order which no prudent man with his knowledge would give, he is responsible for the injury resulting from such improper act; held that this ruling was right.

2. From the evidence, it appeared that the negro, lost by drowning in the service of the defendants, was a green hand at the mill—afraid of water—was near drowning before, having been rescued by others, a fact known to the superintendent; that the employment he was put to was dangerous and requiring great expertness in getting logs out of a pen in the water of the depth of from two and a half to eight and ten feet deep.

Held, under these facts, that the order was illegal and improper, and defendants liable for the loss.

Appeal from the Circuit Court of Duval county.

This was an action on the case instituted to recover the value of a negro slave alleged to have been drowned in the service of the appellants through the negligence or improper conduct of their agent.

The appellants pleaded not guilty in the court below, and an issue being submitted on the plea, a verdict and judgment were rendered in favor of the appellee, who was the plaintiff below.

On the trial of the cause, the following testimony was offered to the jury by the parties respectively, viz:

For Plaintiff, Benjamin Kemble, being sworn, testified as follows:

Knows the Defendant, was in their employ in 1853, in Jacksonville, as agent and superintendent. While in their employment had in charge a negro man named Peter, who was hired of Dr. Murdock; he was a short, thick-set black boy about 26 or 30 years old. He was hired by the year at so much a month, thinks it was $15 per month—the negro was found dead in the water; was drowned while he was at work at the mill—he was found drowned supposed he was drowned at the mill—he was found at Finnegan's wharf; he was at work in the boom, when drowned, by order of witness. In the boom the deepest water is about 8 feet. Another boy named Major was sent outside by witness for a particular stick; he told Peter to go for it, who did so; it was then when he was drowned. Witness did not

send Peter for said stick but sent him into the boom; there were round and sided logs in the boom; the stick Peter went after outside was a very large sided stick. Has known Peter to fall into the river previous to that time, at least Peter said he fell in and has seen him in the water.—*The boy Peter said the dog saved him once from drowning;* (this was objected to by defendant's counsel, and objection reversed,) this was when he was in the employ of Kelley, Timanus & Co.; never knew him to fall into the river at any other times than those mentioned. The negro said he could not swim; (this was not objected to.) He was found on Sunday morning, and was drowned on Friday.

Cross Examined.—The negro went to put the logs in the boom. The water was only 2½ feet but grew deeper as you went out into the stream. From the log to the opening of the boom the water was not over 2½ feet deep. Witness was told that the boys were hired to work at the mill; no particular work was specified; sometimes we had one in the boom and then another, (this was objected to by plaintiff's counsel;) the risk of life is not greater on boom work than other work in the mill; (this was also objected to.) When we hired men at the mill, we generally put them at such work as we thought them best qualified to perform, and which was most profitable. Was not present when Major told Peter to go after the log; when the negro was missed Major then said he had sent him, Peter, and had not heard of him since; did not see Peter engaged in getting this log; witness says Peter was not exposed to any more danger than any other hands on the mill from order of any one; (this was also objected to by counsel for plaintiff.) This negro was only employed in the log pen at times; he was about the work, and was not in the pen more than other hands, and not as much as some; most always with some other hands;

he was good at hauling logs into the mill, that is fixing them for that purpose. The log Peter went after was about 40 feet long—it was a heavy log. No one ever saw Peter out side of the boom; no one knew what had become of him; they missed him and thought perhaps he had run away as he was subject to run away; he run away from witness once and was gone a month; was a superintendant at the mill of "Kelly, Timanus & Co. The log was on the shore when Major was sent for it; we afterwards found it at Finnegan's wharf; knew it was the same log.

Those parts of the direct examination which were objected to by defendants' counsel were then and there permitted by the court to be read to the jury, whereupon the defendant's counsel then and there excepted.

The plaintiff's counsel then called William H. Dupray, who testified as follows:

Was in the employ of defendants in the year 1853 at their mill in this county; knew the boy Peter, who was hired there; has heard that he was hired of Doctor Murdock; he was an ordinary negro about 25 years of age; he was very good at the work he was put at.

The boy was drowned while witness was at the mill; can't say when he was drowned; has seen him employed in the log pen two or three times; witness saw him the day previous in the pen; saw him the morning he was drowned for the last time; out side of the boom the water is deep; don't know whether the boom was open the day the boy was drowned; there was a stick outside on the day before; the logs were hauled from the inside of the boom into the mill; does not know whether the boy could not swim; does not know that the defendants or Mr. Kemble knew he could not swim.

J. W. Moore was called by the plaintiff, and testified as follows to wit:

Was in the employ of the defendants in 1853; knew Peter; has heard Mr. Kemble say he was hired from Doctor Murdock; he was about 25 years of age; he was a valuable negro; he was generally employed in the log pen; at the outer edge of the boom the water is 10 or 12 feet deep; inside, the water is shallow; the logs sometimes lie all over the pen, and often are lying against the outer edge, and have to be removed from there to get to the mill; it is dangerous employment for a person to go to the outer edge of the boom to get logs for the mill, particularly one that could not swim; thinks this was not proper employment to set one at that could not swim; thinks the boy could not swim, for witness saw him before off of a log and went to his rescue; thinks he would have been drowned then if he had not been helped; Mr. Kemble saw this and knew of it; this was the only boy of the name of Peter hired at the mill by Doctor Murdock; the bank goes out gradually into deep water; it is about 40 feet from the shore to the outside of the boom; when hands are sent for logs they are usually sent all over the boom for logs of particular size; does not know what the custom was in setting men at work; 40 or 50 yards from the slip to the boom.

John Chapman, called by plaintiff, testified as follows, to wit:

Was in the employment of defendants in 1853; knew the boy "Peter;" thinks that it was generally known that he could not swim; thinks Mr. Kemble knew it; Peter always acted as though he was afraid when he went near the deep water; has known Mr. Kemble to send him to the outer boom for logs; thinks it was understood by Mr. Kemble that the boy could not swim, because he picked him to go for logs, and was always kicking and cuffing him.

James M. Daniels called for plaintiff.

Knew the boy "Peter;" has always understood he was the property of Doctor Murdock's wife, and belonged to Andrew Wallace, as trustee for her; knows of no other boy of the name belonging to them or in the possession of Dr. Murdock; he was in the employ of defendants, and general rumor says he was drowned; he was a valuable negro; knows of negroes that sold for $1,200; thinks he was drowned in 1853; Dr. Murdock bought some at that price not as good; could not say of his own knowledge what the value of that boy was.

Joseph Finnegan swore for plaintiff.

Bought some negroes in the fall of 1853; thinks they were worth $1,000 in the spring and summer of those years.

Here plaintiff rested.

George K. Fairbanks swore for defendants.

Has charge of a mill in this town; has been accustomed to hire negroes.

Counsel for defendants here proposed to ask the witness what was the general custom among mill men in hiring negroes; whether, when hired, generally, they were employed in any work about the mill the managers saw fit to put them at by such custom. This evidence was objected to by plaintiff's counsel, which objection was sustained by the court and the testimony rejected. Whereupon the defendant's counsel then and there excepted.

James H. McRoy, Jr., sworn:

Heard the testimony of Kemble read; remembers the siding log spoken of; saw it outside of the boom and requested Mr. Kemble to get it in; he said he would send Major after it; the next witness heard was that Peter was drowned; thinks good negroes were worth at that time from $800 to $1,000.

Wm. H. Dupray sworn:

Says that the negro was a very ordinary negro, and did ordinary work about the mill; considered him an ordinary negro; he was not placed at sawing; don't think his services about the mill as valuable as others; he bore the name of runaway.

Here defendants rested.

The court then charged the jury as follows:

"The plaintiff in this action brings this suit for the recovery of a negro named Peter, who, it is alleged, was hired to the defendants, and while in the employment of the defendants, owing to their negligence and want of ordinary care, was drowned and lost to the plaintiff. The hiring of a slave constitutes a bailment of the slave, and in such hiring, as in the hiring of any other personal property, the person hiring is bound to take ordinary care of him, and must answer for ordinary neglect. If, therefore, you find from the evidence that said negro was the property of the plaintiff, and was hired to the defendants, and while in their employment he was lost through the carelessness and misconduct of the defendants or their agent, then the plaintiff is entitled to recover. In all ordinary transactions (not criminal) a principal is liable for any act of his agent where there is negligence, if done within the scope of his authority. If, therefore, you find from the evidence that an order was given to the said slave Peter by a person in the employ of the defendants, who had authority from them to do so, which no ordinary prudent man would have given, and that in consequence of said order the negro was lost, then the plaintiff is entitled to recover; but, if such order, in your opinion, was not an unusual one under the circumstances, and that there was not negligence in giving the order, then the plaintiff is not entitled to recover. If you find from the evidence that the

agent of the defendant knew that the said Peter could not swim, and he knowing this, gave an order to said Peter within his scope of authority as such agent, which order no prudent man with this knowledge would have given, then the knowledge of the fact that he could not swim by the said agent is sufficient. It was the duty of the defendants to employ careful and capable agents.

To all and every part of which charge the defendant's counsel then excepted.

Philip Fraser and G. W. Call, for Appellants.

The appellants, who are mill men, hired Peter of appellee by general contract for service at their mill. During the term an agent of the appellants sent the boy to the boom to run logs to the mill. While there he was sent by another negro outside the boom for a loose log, and in that service was drowned.

It was proven Peter said he could not swim. Testimony was offered and refused as to the custom of mill men.

We take the following points:

1st. The declarations of the boy that he could not swim were not admissable evidence.

2nd. The testimony of the custom of mill men should have been received.—17 Ala., 379; U. S. Digest, 1853, 75, § 45.

3d. The charge of the court was calculated to produce the impression that Peter was drowned in obeying an order of appellants, which, not being true, the charge was error.—14 Geo., 136.

4th. It was error to leave the question of negligence to the jury. It is a question of law for the court.

5th. It is not negligence to send one who cannot swim upon the water.

6th. Under a general contract of hiring the owners will

be presumed to have consented to the necessary risks.—2 Wheaton, 100; 2 Richardson, 458; 11 Iredell, 640; U. S. Digest, 1851, 59, § 11; 4 Porter, 239; 1 U. S. Digest, 374; § 138.

McQueen McIntosh, for Appellee.

The bailment of a slave was a contract technically known as *"locato rei,"* (letting to hire,) and is well defined by Justice Story in his quotation from Pothier. Story on Bail, mar. p. 368.

And the use and enjoyment of the thing bailed does not contemplate its misuse and abuse, or its entire destruction.

The contract is one involving mutual and reciprocal obligation—both parties are mutually benefitted; but as the owner, who has never parted with his proprietary interest, anticipates a return of his property, he reasonably expects that the bailee will confine himself to its reasonable use and enjoyment, and that he will preserve and protect it with reasonable care.—2 Kent Com., mar. p., 589, (5 ed.)

The *implied* obligation to protect the property is as much an element in the contract as the *express* engagement to pay the hire therefor, and this undertaking is *implied* by law.—Story Bail, mar. p., 373, citing Pothier in note; Walker's Am. Law, 406, 408.

If, then, under a general hiring, the *implied* obligation to use the subject bailed with reasonable care constituted a part of the agreement, these defendants are liable to the plaintiff, not only for their own acts, but for the culpable negligence and mismanagement of those who act under their authority.—Wood's Inst., 237; Coop. Inst., 279; 1 Dom. Civ. L., 97, 98, § 1, 3, 4, 5, 6; 3 Petersd. Com. L., 257, citing Coggs vs. Bernard.

The bailee must not only use the property let to hire as the owner would, but he must exercise all the care consis-

tent with the value of the hiring and the nature of his contract.—Rice, 183, Coggs vs. Bernard. Cited in Smith's Lead. Cases, 17 Law Lib., mar. p. 91; Story Bail, 268.

The contract of hiring, as well as the use, may be implied, although there is no contract between the owner and the hirer; and it does not matter whether the loss of a slave by death occurred by reason of his want of skill or not.—King vs. Shanks, 12 B. Mun. Cited in 12 U. S. Dig., 74.

And whenever a slave is lost and it appears that he exposed himself, the presumption will be that he did not voluntarily expose himself, and that his loss was not occasioned by his own act.——Ivy vs. Wilson, Cheves Law Rep., 74.

The abuse of a lawful possession, or an appropriation of the subject hired to a purpose other than that contemplated by the owner thereof, is a conversion of it, and if used in a different manner or for a different purpose, or for a longer time than was agreed by the parties, the bailee is answerable for all damages and even for a loss which due care could not have prevented.—Duncan vs. R. R. Co., 2 Rich. So. Ca. Rep., 613, citing Strawbridge vs. Turner, 9 Law Rep., 613; Horner vs. Thwing, 3 Pick., 492; Mayor of Columbus vs. Howard, 6 Geo. 213; Lunsford vs. Baynham, 10 Hump., 242. Cited from 12 U. S. Dig., 74, § 24.

The law of bailments is the same, no matter by what lawful means the subject is in the hands of the possessor. Jones Bail., 48, citing in note, Lord Raymond.

If in the trial of a civil issue, the court see that justice has been done between the parties, they will not set aside the verdict nor enter into a discussion of the question of law.—Edmondson vs. Machell, 2 Durn. & East, 4; Smith vs. Page, 2 Salkeld, 644; Deetly vs. Msarine, ibid, 646;

Cox vs. Kitchen, 1 Bos. & Pull., 338; Brazier vs. Clapp, 5 Mass., mar. p. 10; Remington vs. Congdon, 2 Pick, 310; Peters vs. Bamhill, 1 Hill S. C. Rep., 234; R. M. Charlton, 7; Peck vs. Land, 2 Geo., 16, 17; Ames vs. Baker, 411, 173; Stroud vs. Mays et al, 7 ibid, 269; Killen vs. Listrienk, 7 ibid, 283; Spears vs. Smith, 7 ibid, 436; Lang et al. vs. Hopkins, 10 ibid, 37; Arrington vs. Cherry, 10 ibid, 429.

Court did not err in permitting the negroe's statements to Kemble to be given to the jury.—1 Geo., 511.

BALTZELL, C. J., delivered the opinion of the court.

This is a suit instituted to recover the value of a negro man slave, alleged to be drowned in the service of defendants, through the negligence or improper conduct of their agent.

One error complained of is in the charge to the jury, given by the judge of the circuit. Its correctness can alone be ascertained by a full understanding of the testimony, which it is not proposed to give in detail, but rather a summary of its contents. Peter, the slave giving rise to this contest, was hired to work at a sawmill owned by defendants in Jacksonville, on the St. Johns river, for a year, at the rate of $15 a month. He was of the age of about 25 or 30, variously described by the witnesses as "ordinary, very ordinary, as an awkward green hand, and his services as not valuable; as valuable, very good at the work he was put at, good at hauling logs into the mill, that is fixing them for that purpose." The nature of the employment in which he was enagged when drowned may be thus described: The pen or boom is an enclosure in the water near the mill, made to secure logs designed for sawing. "The water in it, for the most part, is 2½ feet deep, extending to 8 feet, whilst at the outer edge it is 11 or 12 feet." "The logs lie all over the boom,

often are lying at the outer edge, and have to be removed from there to be got to the mill when hands are sent for logs of a particular size. They are usually all over the boom." It is stated by one witness to be "a dangerous employment for a person to go to the outer edge to get logs, particularly for one that could not swim." The superintendent of the mill thinks that the risk of life is considered no greater than other work at the mill, &c.; says Peter was not exposed to any more danger than any other hand in the mill. He states that, "the boy told him he could not swim; that he fell into the river on a prior occasion—at least, Peter said he fell in; *he saw him in the water,* and Peter said a dog saved him once from drowning." Another witness thinks the boy could not swim. He saw him some time before fall from a log, and went to his rescue; thinks he would have drowned if he had not been helped; the superintendent saw this." A third witness "thinks it was generally understood at the mill that Peter could not swim; that he *acted as though he was afraid* when he went near deep water; has known superintendent send him to the outer boom for logs." The occasion of his death is thus stated: "Peter was found dead in the water; was drowned while he was at work at the mill; was found at Finnegan's wharf; was employed at work in the boom by order of the superintendent when drowned; another boy, named Major, was sent outside by him for a particular stick; he told Peter to go for it, who did so; it was then when he was drowned; witness did not send Peter for said stick, but sent him into the boom; there were round and sided logs in the boom; the stick Peter went out after was a very large sided stick; he was drowned on Friday and found on Sunday; was not present when Major told Peter to go for the log; when

the negro was missed, Major then said he had sent Peter and had not heard of him since."

On this state of facts, the judge instructed the jury as follows: The hiring of a slave constitutes a bailment, and in such hiring, as in the hiring of any other personal property, the person hiring is bound to take ordinary care of him, and must answer for ordinary neglect. If, therefore, you find from the evidence that said negro was the property of plaintiff, and was hired to defendants, and, while in their employment, he was lost through the carelessness and misconduct of the defendants or their agent, then the plaintiff is entitled to recover. In all ordinary transactions (not criminal) a principal is liable for any act of his agent, when there is negligence, if done within the scope of his authority. If, therefore, you find from the evidence that an order was given to the said slave Peter by a person in the employ of the defendants who had authority from them so to do, which no ordinary prudent man would have given, and that in consequence of said order the negro was lost, then the plaintiff is entitled to recover; but if such order, in your opinion, was not an unusual one under the circumstances, and that there was not negligence in giving the order, then the plaintiff is not entitled to recover. If you find from the evidence that the agent of the defendants knew that the said Peter could not swim, and he knowing this and acting within his authority as such agent, gave an order to said Peter within his scope or authority as such agent, which order no prudent man with this knowledge would have given, then the knowledge of the fact that he could not swim by the said agent is sufficient. It was the duty of the defendants to have employed careful and competent agents."

It was objected to these that "they were calculated to produce the impression that Peter was drowned in obey-

ing an order of appellants, which, not being true, the charge was error. The boy Major gave the order, and not the agent of the appellants." The instructions are not liable, we think, to the objection. They are hypothetical, and leave the matter to the jury without any intimation of the opinion of the court. "If you find from the evidence that the agent gave an order to Peter," etc. This is the language of the instruction. It is not that Major gave the order to Peter—at least there is no evidence to that effect before us. The superintendent of the mill states this, but says, in another part of his examination, "that he was not present when Major told Peter to go after the log. *When the negro was missed, Major then said* he had sent Peter and had not heard of him since." Striking out the hearsay statement of Major, which is not testimony, and then removing the statement of this same witness that he, the agent, sent him into the boom, it will be remarked that the question before us is not whether such an order was absolutely given, but whether there was sufficient in the evidence to justify the court in referring the question of its existence to the jury, and we have no hesitation in saying that there was.

If there be error in this charge and those instructions, it consists, in our opinion, in applying the term negligence to what we cannot but regard otherwise than as an act of misfeasance; and if a positive wrong, an error however to the injury of plaintiff and not of the defendants, and of which the latter are not entitled to complain. The first instruction is nearly a copy of one given in the case of Forsyth and Simpson, which received the approbation of this court, and will be more fully noticed hereafter.

It is very obvious that the merits and strength of the case lie in the last instruction. It is the act of the agent of the defendants in causing the negro to go into the boom,

or outside of it, in quest of a log, knowing that he could not swim, that creates the responsibility, and to this the attention of the court will be addressed.

A person hiring a slave is but the assignee of the master, and by the act of hiring acquires for the time his rights to the labor and services of the slave, has the power and dominion over him which the master has, has the responsibility, too, of a master, with the additional obligation that in case of abuse or injury to the slave by improper conduct on his part, he will make compensation for the damage.

Now, what is the extent of this power and authority of the master? Is it absolute, unlimited, uncontrolled? By no means. The slave is subject to his master to the extent of his capacity and power, mental as well as physical, and his duty is to obey his orders to the extent of his ability. Hence, then, results a duty on the part of the hirer to inform himself of this capacity, so as not to engage him, the slave, in a service or labor for which he is unfitted or incapacitated by his mental or physical organization. There is a duty, too, on the part of the owner to be frank and explicit in effecting a hire. Good faith, honesty, the true interests of the master and the slave and the person hiring require, that there be a clear and full understanding on this subject. It is said that a slave hired to work at a mill is subject to any work to be performed there. We think not. A hand used to the saw may be in peril if put at the engine or on slippery logs in the water. The engineer, though fearless in his position, may be in imminent danger from the saw or getting logs in the water. A hand not skilled should not be put at any of these, especially if in addition there is a physical infirmity to prevent an execution of the duty. Take the case of a green hand, unused to a steam saw mill. May he at once be put

to the saw or about parts of the machinery most liable to produce injury to inexperienced persons, and when, in addition, it is ascertained that from alarm and fright he loses his self-possession and is incapable of his own preservation? Such work, most obviously, is beyond his reach and capacity. He should not be subjected to it. The exertion of such power is not the exercise of authority, but the abuse of it—an act of cruelty and oppression having no sanction of law or morality. A master could not rightly punish for disobedience to such an order, and, if he did so, might be liable to the criminal law, which provides "that no cruel or unusual punishment shall be inflicted upon a slave by any master, employer or owner."—Thompson's Digest, 511.

With this view of the principle it remains to apply it to the case before us. Ability to render service on the water, for the most part is acquired, and is the effect of early practice and training. It takes time and use for those unacquainted with the element to accommodate themselves to their new position. With some there is a natural infirmity, often not to be overcome, that disables from service on or near it. They at once lose their faculties and self-possession, and are scarcely intelligent beings. Should there have been a narrow escape from drowning, it but adds to the embarrassment and difficulty.

To say or even supose that a master would force such a slave into such a service is wholly to misunderstand and misrepresent him. It is alike a mistake that he would or could communicate such authority in hiring him.

In the present case we have seen that Peter was afraid in going near deep water; that he told the agent he could not swim, and it was generally understood he could not. He was seen to fall in and was rescued from drowning by the help of another. He said he had been saved from

drowning by a dog prior to this. More than this, the employment itself was of an unusually perilous character, requiring a resolute and stout head and heart and active and expert limbs, and experience and acquaintance with the subject.

Under such a state of facts, there can be no hesitancy on the part of this court in agreeing with the court below and jury in regarding the act of this agent as wholly unwarrantable and illegal and in holding his principals responsible.

On the trial, the superintendent said, "The boy Peter told him the dog saved him once from drowning, and the negro said he could not swim." This was objected to by defendants as not being legal testimony, and the court below admitting it, this is presented as ground of error. It is very obvious the only effect of these expressions was to show that the superintendent was aware of this inability of this boy. We think the point not at all material, as there is abundant other testimony in the case establishing the fact of knowledge, so that the exclusion of this could have had no effect whatever if the ruling was erroneous. The statement is not mere hearsay from the negro—it is the admission of the party himself charged with the conduct of this slave that he had information as to his ability. It may have been imperfect, still it was knowledge, and we think it was admissable. We shall not, however, for the reason just stated, enter into any argument to show that it was entirely unexceptionable.

The next exception is to the refusal of the court below to admit the testimony of George R. Fairbanks. It was proposed to ask him the general custom among mill-men in hiring negroes; whether, when hired generally, they were employed in any work about the mill the managers can find to put them at. This is upon the supposition

that the rights of the parties in these contracts are not understood or defined by law, and that it was necessary to resort to witnesses to ascertain them. Admitting this to be the case, it would scarcely comport with right or justice to appeal to one of the parties to a contract, or to any number of parties, when there are numerous contracts of a like character to give the rule of construction so as to fix and ascertain their own rights and responsibilites and those of the other contracting parties.

A custom or mode of dealing between persons engaged in a particular pursuit sometimes reaches to the estimation of an implied bargain. It does not extend to others not parties to the custom nor participant in it. If the question had been proposed to owners, or persons hiring, as to their consideration and custom of treating the subject, there would be greater plausibility in it. We think there is no difficulty in the application of the law to the case and in ascertaining the rights of the parties, and therefore think the evidence was rightly rejected.

From the view already taken of the subject, it will be evident that we are not inclined to favor the motion for a new trial.

Whilst such is our conclusion as to the law of the case, it is yet a part of our duty to see that it has the support and sanction of other courts, and especially of those of our sister States familiar with this peculiar species of property and the relations incident to it. Unfortunately, we have not access to books, and particularly those bearing most directly on the points, and are confined, in some degree, to digests. Those in our power have received very careful and attentive consideration. A case of this kind was before the Supreme Court of this State in 1853, reported in 5th vol. Florida Rep., p. 337—Forsyth vs. Simpson. In this the instruction of the Circuit Court was almost iden-

tical with those given here, excepting that as to swimming, and this court sustained the ruling. The facts, as stated in the opinion, were that the slave was ordered to jump on board a steamer from a flat boat lying along side. In the attempt to do so, he struck the guards of the steamer, fell into the water and was drowned. The court say, "the contract for hiring constitutes a bailment of the property, and, it being mutually beneficial to both parties, something more than good faith is required. The owners of the boat were bound to take ordinary care of the slave, and, failing to do so through their agents, they are responsible for the consequences. Apart from other views, considerations of public policy, the interests of the master and humanity to the slave require that he should be shielded from the unrestricted control and oppression of irresponsible subordinates. Public policy emphatically demands that the owners of boats and railroads, and other public conveyances, should employ careful and capable agents in their respective business." It is to be regretted that the facts and circumstances connected with the order to the slave, and which would principally give it character, are not stated in the opinion nor the report. It is only stated that the jury found gross negligence, yet, without these, it is difficult to conclude that in the mere giving of such an order there was gross negligence. The force of the decision on this account is somewhat diminished.

In the case of Ives vs. Wilson, decided by the Court of Appeals of South Carolina, which was for the loss of a negro occasioned by a mortal injury produced by the collision of two steamers, the jury were instructed that "to make the defendant liable the collision must have resulted from his intention, his want of skill or negligence in navigating his vessel." The court say the jury had evidence upon which they might conclude the defendant was guilty

of negligence; if so, the verdict is right."—Cheeves' Law Rep., 75.

The Supreme Court of Tennessee hold language of this kind: "The law exacts from the hirer of a slave an observance of humanity and that measure of care and attention to his comfort and welfare that a master with a humane sense of his duty would feel it incumbent on him to exercise in the treatment of his own slaves."—10 Hump., 267.

In Georgia, language is used to the same effect: "He ought to use the thing and take the same care in the preservation of it which a good and prudent father of a family would take of his own. Hence, the hirer being responsible only for that degree of diligence which the generality of mankind use in keeping their own goods of the same kind, it is very clear he can be liable only for such injuries as are shown to arise from an omission of that diligence; in other words, for ordinary negligence."—6 Georgia.

In Alabama, it is held, that "the hirer is liable only for gross negligence, which is defined to be the want of slight diligence or a failure in the commonest degree of prudence, or an omission to exercise the diligence which men, habitually careless or of little prudence generally, take in their own concerns."—Ware vs. Taylor, 4 Port., 239.

In North Carolina it was held that the hirer of a slave was bound to use such diligence and prudence as a man of ordinary prudence, could if the property were his own; that as a slave was a being, so much care was not necessary as would be required of the bailee of a brute or inanimate thing; that, as F had hired the slave for this very purpose, he would be presumed to know all the dangers and risks, and therefore plaintiff could not recover.—11 Ire., 640; U. S. Dig., 1851, p. 59.

This was the case of a boy 12 years old, hired to drive a

horse near the shaft of a gold mine. The boy whilst working at night, being without an overcoat, had gone to the fire to warm himself, and on his being called to start the horse, being drowsy, fell into the mine and was killed.

In the case of McDaniel vs. Ewing, decided by the Court of Appeals of S. Carolina, a negro man, Jack, was hired as one of the crew of a steamboat and was lost, being knocked overboard, he and the captain being excited by spirits at the time. The court decided that the hirer was liable, inasmuch as Jack was detained after his time had expired. In another aspect of the case, if Jack was not discharged, that "the company could not be liable for the loss of Jack, unless it resulted from some wilful misconduct of the captain, or such as should be regarded in the light of carelessness or negligence." They say further, the captain had a right to order the boat to be turned back, and Jack was bound to obey the order, and whether the manœuvre was conducted with skill or not on the part of the captain, could make no difference, as the negro was bound to run all the hazards of employment from orders given in good faith and by an officer competent at the time the company employed him. 2 Rich., 457.

These two latter decisions by no means impugn the force of the views we have taken. They decide, that when a boy is hired for a special purpose—for instance, as one of a boat's crew—he undertakes the hazards of the employment; so does an engineer of a steamboat; or a hand at the saw. If either of them, without any order or misconduct of his superior, gets entangled in the machinery so as to lose his life, the loss may not fall on the person hiring. The other cases most evidently show the propriety of the present find and the appropriate ruling of the court below. We see no reason, on a view of the whole case, to disturb the judgment of the court below, and it is therefore affirmed with costs.

EPHRAIM L. HARRISON AND WIFE, APPELLANTS, VS. HIRAM ROBERTS, APPELLEE.

1. The lien of a judgment at law attaches to and binds the real estate of the defendant therein, acquired subsequent to the rendition thereof.
2. There is no rule of law or principle of equity which prevents a first mortgagee from purchasing the mortgaged property when sold at sheriff's sale under a judgment prior to the mortgage; and, in such case, he takes absolute title.
3. When a surplus remains after the satisfaction of a prior execution under which property mortgaged has been sold, equity will regard the fund as substituted for the land, and pursue and distribute the same amongst subsequent mortgagees according to their priorities.
4. The court will not consider the validity of a bargain and sale of real estate between parties who make no objection to the transfer, at the instance of another, whose rights are not affected thereby.

Appeal from Duval Circuit Court.

For the facts of the case, reference is made to the opinion of the court.

McQ. McIntosh and *G. W. Call,* for Appellants.

P. Fraser, for Appellee.

PEARSON, J., delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of Duval County, sitting in chancery.

On the 22d of September, 1851, Samuel Spencer, being the owner of lot No. 4, in square No. 2, in the town of Jacksonville, mortgaged the same to Joseph S. Baker, to secure the sum of 1,100 dollars, payable on the 1st day of July, 1852.

Thereafter, on the 22d of November, 1851, he mortgaged the same property to Hiram Roberts, to secure the payment of the sum of 1,410 dollars and forty-three cents, payable on the first day of January, 1853.

At the time of and previous to the execution of these mortgages Spencer was otherwise indebted, and particularly there was a judgment in force against him, recorded in Duval Circuit Court on the 3rd of June, 1851, in favor of Thomas W. Jones, for the sum of 92 dollars and twenty-one cents, together with interest and costs. On the 27th of November, a few days after the execution of the second of the mortgages aforesaid, Jones sued out an execution upon his judgment, which he caused to be levied upon the house and lot of Spencer, which was the subject of the aforesaid mortgages, under and by virtue of which levy the property was sold by the sheriff of Duval county on the 5th of January, 1852, Joseph S. Baker, the first mortagee, becoming the purchaser for the sum of 1,750 dollars. Joseph S. Baker, on the 17th of January, 1862, sold his interest in the property to Mrs. Julia L. Harrison, who, together with her husband, the said Ephraim L. Harrison, were admitted into possession and have ever since occupied the premises as their own, adding, in the meantime, materially to their value by substantial and permanent improvements thereupon.

On the 17th of January, 1853, Hiram Roberts filed his bill for a foreclosure of his mortgage, and, on the 7th of July thereafter, Harrison and wife filed their cross-bill to adjust the equities between all the parties.

Such is the state of facts, in the opinion of the court, presented by the record, and for the better understanding of the matter, we choose to regard them in this aspect for the present, leaving for further consideration the details of the subject which are relied upon as varying in some degree this view of the case.

It is urged that the judgment of Jones was not a lien upon any other real estate of Spencer than that of which he was seized and possessed at the date of the rendition of

the judgment, and as this property was subsequently acquired by him, there was no judgment lien upon it, and consequently the sheriff's sale was void and the mortgages took preference agreeable to their priorities. This can scarcely be regarded as an open question in this State, having received, if not a direct adjudication upon the point, at the least, such a manifest indication of the opinion and views of this court as to remove all prior doubts on the subject. When a statute as we think this does, (Thompson's Digest, sect. 4.,) expressly and clearly declares the design of the Legislature, it is not allowable by an extremely refined and technical construction to do away with its force and impair its efficiency. When it is enacted that judments "shall create a lien and be binding upon the real estate of the defendant," it is not for this court to say that any portion of that estate shall be exempt from such lien. This would be to create a distinction and make a restriction not contemplated by the legislative authority. Such a distinction is in itself unnatural and unreasonable. Why should property, acquired perhaps by the very means of a loan, be relieved from liability to a judgment rendered for the identical fund with which it was purchased? Such a rule would confound all our ideas of right and justice. This question was very fully considered in the court below, and the authorities cited in the opinion of the Circuit Court, in our opinion, conclude the question of the lien of a judgment upon real estate acquired by defendant subsequent to its rendition. The lien of the judgment then prevailing on this property, a sale of the same by execution founded upon the judgment, would carry the title free from the incumbrance of the mortgages. If indeed the mortgages had been executed and recorded in due legal form anterior to the date of the judgment, a sale under it, as provided by our statute, could

only have affected the equity of redemption and left the property itself subject to the mortgages and their equities.

But, it is further argued, that Baker, being the first mortgagee, was thereby estopped from purchasing, as another might have done, at the sheriff's sale. Is this so? Was he prevented by any law or any rule or principle of equity from making such purchase? Does his purchase connect itself with his mortgage interest, so that the sum paid by him on the sale under execution creates but an addition to his mortgage debt, and so to be held by the same security? Or, does he obtain by such purchase the legal estate in the property absolutely? A mortagee may not contract with the mortgagor *"at the time of the loan* for an absolute purchase of the lands for a specified sum, in case of default made in payment of the mortgage money at the appointed time, justly considering it would throw open a wide door to oppression and enable the creditor to drive an inequitable and hard bargain with his debtor, who is rarely prepared to discharge his debt at the specified time." Coot on Mortgages, p. 14.

Otherwise, there is no objection to his purchase of the equity of redemption; and, where the transaction was fair, though the full value was not given, the agreement has been enforced. 3 Simons, 42; 11 Clark and Finnelly, 648.

If, then, the mortgagee may purchase the equity of redemption from the mortgagor, we see no reason why he may not purchase it and the entire property, when sold at sheriff's sale, at the instance of a third party. In such case, there is no room for oppression or opportunity for taking advantage of the necessities of the mortgagor. To deny this right to purchase on the part of Baker would be to place it out of his power to secure his mortgage debt in the event another had become the purchaser at sheriff's sale, and thereby secured the title in fee. Indeed, con-

sidering the insolvency of Spencer, the mortgagor, the purchase of Baker and the suspension of the surplus purchase money above the amount of the execution, so far from working or operating as an injury to Roberts, has been the means of securing a considerable portion of his mortgage debt, which otherwise might have been lost; and he may now obtain all the relief which equity would have afforded him had he filed his bill in the first instance for a foreclosure of his mortgage, offering, as he was bound to do, to redeem all prior incumbrances. The mortgagee, Baker, then, having the legal right to purchase, by so doing, ceased to hold the property in pledge under and by virtue of his mortgage and became absolute owner of the same in fee.

It is further argued that Baker did not complete the purchase of the property under the execution, and is not, therefore, entitled to be regarded as such owner. So, therefore, it becomes necessary to examine the facts connected with this sale. The sum paid by Baker to the sheriff in satisfaction of the execution at the time of the sale, was about 140 dollars, while his bid for the property was 1,750 dollars. The premises being indivisible, a sale of a smaller portion of them to satisfy the execution could not be had.

Such is the fair inference from the facts, as there has been no complaint of irregularity in the sale, and none have moved to set it aside or insisted that too much was sold. The sheriff receives on Baker's bid a sum sufficient to pay the execution in favor of Jones and returns the same satisfied, together with the fact of his sale. But there is a balance of some 1,410 dollars, which Baker insists on discharging in part by his mortgage of 1,100 dollars and interest, and the remainder in cash. The sheriff refused to accede to this arrangement, and so the matter

has stood until the filing of these bills and the proceedings had thereupon. It is very obvious that Baker was equitably entitled to the mode of settlement he proposed with the sheriff, and if at that time a court of chancery had been applied to, it would have allowed his claim and compelled the receipt of the mortgage demand. Upon the clearest principles of equity jurisprudence, if another person had become the purchaser at the sheriff's sale and actually paid the purchase money into the hands of the sheriff, the residue, after satisfaction of the execution, would still have been equitably bound by the mortgages, the money being but a substitute for the land. Spencer being insolvent, equity would unquestionably have enforced this claim against him. The rule is that a complainant must do equity as a condition of claiming equity. After adjusting the mortgage of Baker, the remainder of the fund would, upon application of Roberts, have been paid over upon his second mortgage; and this, we think, is the whole extent of the interest which he can rightfully claim, either in the lot or the proceeds of its sale. If he had filed his bill against the prior incumbrances, Jones with his judgment and Baker with his mortgage, and a sale had been ordered, he could have obtained no more than this. But this has already been effected by the sale under Jones' execution; that execution is satisfied; Baker tenders his prior mortgage for satisfaction, and the remainder of the funds arising from the sale, to Roberts.

It is not pretended that there was any unfairness in the sale, or that the property was sold for less than its full value; nor is it doubted that Jones had a right to sell it under his execution. Why then another sale, with no other purpose, as far as we can discover, than to obtain a better price by reason of the improvements made by Mrs. Harrison since her occupancy under the impression that

she was the owner, and thereby increase the dividend of the second mortgage. We see neither equity nor good conscience in this, and upon the principle that equity will consider that as done which should have been done, are fully satisfied that neither in law nor in equity should the position of the parties be disturbed.

Objection was made upon the argument to the rights of Mrs. Harrison as against Baker; but we see no difficulty in that respect. Baker concurs with her in her application to the court for the title of the property in question, and it is not for Roberts to interfere by taking exceptions proper only for the parties in interest themselves. When Baker claims the benefit of the statute of frauds to protect him against his sale to Mrs. Harrison, or raises any other objection to the consummation of his bargain with her, it will be time enough to consider that question. Baker himself makes no such objection, and his answer is in full support of Mrs. Harrison's claim. She has been in possession from the date of her purchase, has made considerable repairs and improvements, paid a large portion of the purchase money and is willing and offers to pay the residue, and there is no reason, that we can see, to doubt the integrity and fairness of Baker in the transaction.

We are, then, of opinion that by the purchase under Jones' execution Baker became owner of the lot and is entitled to a conveyance of the same upon the payment which he made of the amount of the execution, the satisfaction of his mortgage since assigned to Mrs. Harrison and the payment of the residue of his bid.

Let the decree of the Circuit Court be reformed in accordance with the principles laid down herein, and the cause remanded for further proceedings consistent therewith.

The appellee Roberts to pay the costs in this court.

JACOB SUMMERLIN, APPELLANT, VS. SIMEON S. TYLER AND WIFE, APPELLEES.

1. The provision of the statute which prescribe the time which appeals from the Justices' Court to the Circuit Court may be taken, has reference to the adjournment of the court, and not to the date of the rendition of the judgment.

2. Where the record furnishes no evidence at what time the court adjourned, the presumption of law is that the justice, in approving the appeal bond, did his duty, and that the same was perfected within the time prescribed by the statute. In the absence of proof to the contrary, the legal presumption always is that the officer has acted strictly within the line of his duty.

3. It is not a compliance with the requisition of the statute to merely pray the appeal within the three days. It must be perfected within that time by the actual payment of the costs and the tender of the appeal bond.

Appeal from Duval Circuit Court.

The appellee instituted a suit against the appellant in a Justices' Court of Duval county. On the 15th day of February, 1855, judgment was rendered against the appellant, and an appeal being taken to the Circuit Court, he filed his appeal bond as required by law on the 20th day of the same month. There is nothing in the record to show when the Justices' Court, in which the judgment was rendered, adjourned. At the spring term, 1855, of the Circuit Court, on motion of the appellees, the appeal was dismissed on the ground that "more than three days had elapsed from the trial of the case and the signing and approval of the appeal bond."

From this ruling an appeal was taken to the Supreme Court.

F. I. Wheaton, for Appellant.

P. Fraser, for Appellees.

DU PONT, J., delivered the opinion of the court.

The question presented by the record in this case for our adjudication arises out of the provision of the statute imposing a limitation of time within which a party in a Justices' Court may take an appeal to the Circuit Court, viz: whether within three days after the *rendition of judgment,* or within that time after the *adjournment* of the court? The statute may be found in Thompson's Digest, at page 474, and is in the following words, viz: "If either party shall be disssatisfied with the judgment of the Justice of the Peace, in any cause tried before him where the amount in controversy shall exceed the sum of ten dollars, such party may, within three days after the adjournment of the court at which the said judgment was rendered, demand an appeal to the Circuit Court of the county; and it shall be the duty of the said justice to grant said appeal upon the applicant's paying the costs and giving bond and security for the eventual costs and condemnation money," &c., &c.

A careful reading of the statute is alone necessary to solve the question raised in the assignment of errors. It is very manifest that the appeal must be taken within three days after the adjournment of the court, and not after the date of the rendition of the judgment.

In this case, the record furnishes the fact that the judgment was rendered on the 15th day of February, A. D. 1855, and that the appeal bond was given on the 20th day of the same month, or *five* days after the date of the judgment. But it nowhere informs us at what date the court adjourned; and, in the absence of proof on that point, the legal presumption is that the justice did his duty in approving the appeal bond, and that the appeal was perfected within three days after the adjournment of the

court. In the absence of proof to the contrary, the legal presumption always is, that the officer has acted strictly within the line of his duty.

To meet a supposed difficulty in the case, the counsel for the appellant argued, that the notification of an *intention* to take the appeal, made within the three days, is a sufficient compliance with the requisition of the statute, and that the costs might be paid and the bond given at any time thereafter. We do not coincide in this interpretation of the statute. Our opinion is, that the appeal must be *perfected* within the three days by the payment of the costs and the actual tender of the bond.

Let the judgment of the Circuit Court be reversed, with directions to reinstate the cause and to proceed therein according to law.

Decisions

OF THE

Supreme Court of Florida,

AT

MARCH TERM, 1856,

Held at Tampa.

B. J. HAGLER, APPELLANT, VS. JOHN MERCER, APPELLEE.

Where a clerk has failed to enter judgment on an order of court to that effect at one term, it is proper to have it done thereafter at the next term.

Appeal from Hillsborough Circuit Court.

The opinion of the court contains a full statement of the facts presented by the record.

James Gettis, for Appellant.

J. K. Glover, for Appellee.

BALTZELL, C. J., delivered the opinion of the court.

John Mercer instituted his action to recover of the defendant Hagler the sum due on promissory note for $350. The defendant filed a plea, which having been withdrawn, judgment was given by *nil Dicit,* and a writ of enquiry was awarded to the clerk to assess the damages. This

was at April term, 1854. At that term the clerk died during the session of the court, having, however, entered a judgment formally, omitting and leaving a blank for the damages and amount as well as that of the costs, which it is admitted was not perfected on account of his death. At the next term, on application of the court, a judgment was entered, on motion, to supply this deficiency, inserting the amount due after an assessment by the clerk and completing the judgment as originally designed to be entered.

We have no hesitancy in saying that the court was right in granting the order asked for. It was but to complete that which had been left undone at the previous term through a dispensation of Providence, and not through the fault or laches of the party. The order was to the clerk to assess the damages and enter judgment. He omitted to assess the damages, and without this could not enter the judgment. The order, then, was unexecuted, and remained as a duty to be performed, without any further direction of the court, by his successor.

Nor was it necessary to give notive by *scire facias* to defendant. He had already admitted the debt in the declaration, the amount of the note, to be due. The addition of the interest to the principal—matter of calculation merely and purely ministerial in its character——was all that was required to ascertain the amount for which judgment should be entered. This calculation is not made on motion of the party; it is usually by the plaintiff's attorney for the clerk, or by himself without aid.

We have spoken of the judgment in this case as by *nil dicit*, and this is its proper appellation, although the term default is used in the order. The defendant had withdrawn his plea, and said nothing further—hence the judgment was against him. The substance is to be regarded, and not the form, in considering questions of this nature.

There are two judgments in the record; one entering the judgment as of the date of the 8th of November, 1854, to which our remarks are addressed, and which is the judgment directed to be affirmed; the other is an entry of judgment *nunc protunc* which it will be the duty of the judge below to order to be vacated.

The judgment will be affirmed with costs.

JOHN MERCER, APPELLANT, VS. HERBERT H. BOOBY, APPELLEE.

The appearance by attorney of a party summoned as a garnishee, cures any defect in the service of the writ of garnishment.

Appeal from Hillsborough Circuit Court. For the facts of the case, reference is made to the opinion of the court.

Jos. B. Lancaster, for Appellant.

J. T. Magbee, for Appellee.

DUPONT, J., delivered the opinion of the court.

The appellant John Mercer was summoned by a writ of garnishment, to answer and set forth what goods and chattels, rights and credits, money or effects were in his possession or control, belonging to Philip S. Lever, the plaintiff in execution. The indorsement on the writ is as follows: "Served—July 25th, 1854—E. T. Kendrick, Sheriff." The record shows that at the fall term, 1854, the parties *appeared* by their attorneys and that a judgment was entered against the garnishee for the want of a plea or answer.

The error assigned is that the endorsement on the writ

does not show *how* the service was perfected, whether by delivery of a copy or otherwise.

The statute (vide Thompson's Digest,, 372,) provides that the service of the writ of garnishment shall be the same as is provided in the case of a *summons ad respondendum,* and it has been heretofore decided by this court that the *appearance* of a defendant in a suit cures any defect in the service of the writ. (D. B. Wood & Co. v. Bk. of the State of Geo., 1 Fla. Reps., 378.) We can perceive no good reason why the same rule should not be applicable to the service of writs of garnishment.

Therefore let the judgment of the Circuit Court be affirmed.

WILLIAM L. CAMPBELL, APPELLANT, VS. CHAFFEE, ST. ARNAUD AND CROFT, APPELLEES.

1. From the terms of the statute providing for the commencement of suits in the court of common law, it is clearly deducible that the debt or damages sued for, as set forth in the præcipe, ought to be inserted in the summons *ad respondendum;* but the omission by the clerk to do so does not render the summons void.
2. Where an amendment in the original process is allowable, the Supreme Court, upon error brought, will give to the party entitled thereto the same benefit of the amendment as though it had been actually made.
3. A defect or irregularity which is *apparent* upon the face of the original writ or summons, (if the same is not carried into the declaration) is not the subject of plea in abatement. It can be taken advantage of only by motion to quash. Only matters extrinsic or *dehors* the writ or summons can be so pleaded.

Appeal from Hillsborough Circuit Court.

The opinion of the court contains a full statement of the facts of the case.

James Gettis, for Appellant.

J. T. Magbee, for Appellee.

DuPONT, J., delivered the opinion of the court.

This was an action of assumpsit, brought by the appellees to recover from the appellant the amount due upon a promissory note. The *summons ad respondendum* omitted to state the damages, but was in other respects in the usual form. At the appearance term the defendant filed a plea in abatement in the following words, to-wit:

"The defendant, by James Gettis, prays judgment of the said writ and declaration, because he says that there is no sum of money whatever set forth or spoken of in said writ; and this the said defendant is ready to verify. Whereupon he prays judgment of the said writ and declaration, and that the same may be quashed," &c.

To this plea there was a demurrer filed which was sustained by the court, and the plea adjudged to be bad. At the next succeeding term a judgment for the damages was entered for the plaintiffs; whereupon the defendant prayed an appeal to this court, and now assigns for error the overruling of his said plea in abatement.

Under this assignment of error two questions are presented for our consideration: First, whether the omission to state the damages in the summons is such a defect as will render the summons entirely void? and, secondly, if it were, whether it could be taken advantage of by plea in abatement?

The statute regulating the commencement of suits provides for the filing of a *praecipe* or memorandum in the clerk's office, previous to the commencement of the suit, in which is to be set forth a statement of "the names of the parties, the nature of the action and the amount of the debt, or damages" sued for. It further provides, "that it shall be the duty of the clerk upon the receipt of such

praecipe or memorandum, to make out therefrom a writ of capias or summons *ad respondendum,* which shall be called the original and which shall be served by the sheriff," &c.—Vide Thompson's Digest, 325.

From the fact that it is required that the *praecipe* shall state the *debt* or *damages* sued for and that the summons shall be made out therefrom, it is but a natural inference that the debt or damages should also appear in the latter. This inference is too obvious to need any elaboration. But whilst we adopt this conclusion and would enforce upon the clerks of the Circuit Courts the propriety of a strict attention to this direction of the statute, we cannot admit that the omission to insert the debt or damages will render the summons void. We are rather inclined, where the debt or damages are stated in the *praecipe,* to look upon such omission as a misprison of the clerk, and to accord to the plaintiff the benefit of an amendment. As the defence to the merits is always made to the cause of action as set forth in the declaration, there can be no surprise to the defendant, nor can the omission work any detriment to his rights. The office of the summons *ad respondendum* is to notify the defendant of the nature of the demand to be made against him, and to call him into court to respond thereto. If the names of the parties to the suit, the nature of the action and the time for the appearances be distinctly set forth in the summons, it would seem to be all that is requisite, until the filing of the declaration, to enable the defendant to prepare for his defence; and the omission to state the amount of the debt or damages must be viewed merely as an irregularity and curable by amendment.

It is true that in this case no amendment was asked for or made, but the plaintiff proceeded to take his judgment for the damages while the summons remained thus un-

amended. It is, however, well settled, that upon error brought, where an amendment in matter of form is admissible, the law will presume that it has been made and will give the party entitled to the same, the full benefit of it, as though it had been actually made.—Vide Tidd's Practice, 928, citing 2 Str. 1,011; Stephens vs. White, 2 Wash. R. 203. The cases of McClelland vs. Crafton, 6 Greenleaf, 307, and Clark vs. Herring, 5 Binn., 33, cited to the point under consideration by the counsel for the appellant, from 1 Metcalf & Perkin's Digest, 146, § 60, do not support the position assumed, but rather sustain our views. The citation from the Digest is as follows: "The total omission or the smallness of the *ad damnum* in a writ cannot properly be considered as merely a circumstantial error within the statute of 1821, chap. 59, after the rendition of judgment; but, until judgment, it may be so considered. Therefore, where no damages had been laid in the writ, the plaintiff, after verdict and before judgment, may have leave to amend by inserting a sufficient sum." Now it will be here noted that the materiality of the omission is made to depend upon the peculiarity of the local statute, and that notwithstanding such materiality, the error was amendable before judgment.

On the same page of the Digest, and in paragraph 61, it is said, "but where no *ad damnum* is inserted in the writ, and the jurisdiction of the court depends on the amount of the damages demanded, the defect cannot be amended," citing 2 N. H., 322, Holt vs. Molony. In this case it will be seen that the refusal to admit the amendment is based upon the fact that the amount of the *ad damnum* determined the jurisdiction of the court, and as our Circuit Courts are not thus limited, the authority is not applicable.

As a further argument in support of our views, it may be remarked that in the majority of the States where this

question has been adjudicated, special bail is allowed, and therefore the amount of the *ad damnum* is in some measure essential to be stated in order to determine the amount of the bail, while in our State there is no such thing as special bill. It is doubtful whether even at common law it was usual or necessary to insert in the original process the amount of the debt or damages. This inference is clearly deducible from what is said by Mr. Tidd in his treatise on Practice. Speaking of the original process used in the several courts, he says: "Before the making of the statute of 13 Car. II, Stat. 2, c. 2, a defendant might have been arrested and holden to bail for any sum of money upon a common bill of Middlesex or latitat, &c., not expressing the particular cause of action. It consequently happened that he was frequently arrested and holden to bail or imprisoned for a large sum of money, when perhaps there was no real plaintiff or no cause of action. To remedy this mischief, it was enacted that "no person arrested by any sheriff, &c., by force or color of any bailment writ, bill or process, issuing out of King's Bench, wherein the certainty and true cause of action is not expressed particularly, shall be compelled to give security for his appearance in any penalty or sum of money exceeding the sum of forty pounds.'" * * * * "In trespass, therefore, and in other cases, where the defendant either cannot or is not meant to be arrested and held to special bail, the process is in general, in common form, requiring the defendant to answer the plaintiff in a plea of trespass." * * * * * "When the cause of action is of a bailable nature, and it is intended to arrest the defendant and hold him to special bail for a larger sum that forty pounds, there should be a clause of *ac etiam* in the process, and in such case, an omission in the *ac etiam* part of the writ of the sum for which the defendant is arrested, or that it was due on promises,

is irregular and he cannot be holden to special bail thereon." 2 Tidd Prac., 149-'50.

The same author at page 159, remarks further on this subject, "By the statute 12 Geo. 1, c. 29, s. 2, the sum specified by the affidavit of the cause of action is required to be indorsed on the back of the writ or process for holding the defendant to special bail. This part of the statute, however, is merely directory to the sheriff, and does not avoid the process when the sum sworn to is not indorsed upon it."

From this authority it would seem that the only object to be accomplished by stating the amount of the debt or damages in the process, is to lay the foundation for holding the defendant to bail, but as by our statute no bail can be required of the defendant, the rule would seem to be inapplicable to our practice, upon the maxim of *cesante ratione, cesat ipsa lex.*

The next question proposed to be considered is how such omission may be taken advantage of, whether by motion, or by plea in abatement. It is laid down in all of the treatises on the subject of pleading that as *oyer* of the writ cannot now be craved, no matter *apparent* upon the face of the writ can be made the subject of a plea in abatement, unless the mistake in the writ be carried also into the declaration. Only matters extrinsic, or *dehors* the writ, such as misnomer, coverture, non-joinder, &c., &c., can be thus pleaded. Vide 1 Chitty on Pleading, 279, 485, and '6; Tidd's Practice, 636. Matters apparent upon the face of the writ must therefore be the subject of motion.

The citations made by the counsel for the appellant, from 1 U. S. Dig, p. 5, § 85, 86 and 87, are manifestly in conflict with the English rule upon the subject. We have not had access to the cases referred to, and it is not improb-

able that the doctrine as laid down in the Digest, may be broader than is warranted by the cases.

Upon a mature consideration of the subject, we are of opinion that there was no error in overruling the defendant's plea in abatement. Therefore let the judgment of the Circuit Court be affirmed.

WILLIAM B. HOOKER, APPELLANT, VS. WILLIAM H. JOHNSON, APPELLEE.

1. Where a witness has a joint interest with the party for whom he is called to testify, either in the subject matter to be recovered or in the contract as a general partner, joint or part owner, or joint contractor, by which he has an interest in the very thing claimed or in the money to be received, he is incompetent.
2. Although a witness has answered that he is not interested in the result of the suit pending, this does not prevent a further examination into his real situation and the facts of the case as to his interest.
3. The statute of 1854, as to the admission of shop books and other accounts in evidence construed. Held, to adopt the liberal principle of the American courts with their reatrictions, that it is not confined to merchants; that the entries to be admitted must be originally made or contemporaneous with the transaction; that the book must appear to be fairly kept, and free from erasures and interlineations, and the party make affidavit that the articles were delivered and the labor and services actually performed; that the entries were made at or about the time of the transactions and are the original entries, and that the charges have not been paid.
4. As a general rule, evidence must be given to the jury before the case is submitted and the judge gives his charge, yet there are exceptions, and the omission to read the obligation declared on, which is admitted by the pleadings, is one of these.
5. The instructions of the court to the jury should be confined to the issue made by the pleadings, even although this be immaterial.

Appeal from Hillsborough Circuit Court.

Johnson, the appellee, instituted an action of covenant

against the appellant in the court below, on an agreement in writing between the parties, dated 18th January, 1853, which agreement is fully set forth in the opinion of the court. The declaration alleges that Hooker the defendant, did not perform his covenants in the several respects set forth in the agreement, and that he did not furnish seed, corn, &c., as he therein agreed. The defendant filed five pleas—to the two first of which there was a demurrer, and, the demurrer being sustained, the said two first pleas were stricken out. The remaining three pleas allege, first, that the plaintiff hath not well and truly performed his part of the said contract; second, that whatever part of said contract was left unperformed by defendant was so left by reason of the non-performance, by plaintiff, of his part of said contract; third, that the plaintiff was indebted to defendant in a large sum of money on various accounts, which he prays may be set off, &c.

At the trial, the plaintiff offered two witnesses, who were first sworn on their *voir dire*. One of them, Jessee Gibson, being questioned as to his interest, answered that "he was not interested in the result of the present suit." He was then asked, if "he and plaintiff had not agreed to plant the premises in the declaration mentioned in partnership before or at or after the said contract between plaintiff and defendant," but plaintiff by his counsel objected, and the court, sustaining the objection, refused to allow the witness to answer. Plaintiff's counsel then advised the court and defendant's counsel that they withdraw their objection to the above interrogatory; but defendant's counsel replied that they would impeach the testimony by other witnesses. With this view, Seth Howard was asked by defendant what he knew in relation to the partnership of Jesse Gibson with plaintiff in planting, &c.; but the counsel for plaintiff objected and the court sus-

tained the objection. To which ruilng of the court defendant by his counsel excepted.

Defendant by his counsel then proposed to introduce the book of defendant in which the original entries were made of the supplies the plaintiff had received from defendant, without having first introduced evidence to show that said book was a merchant's book, or to show its character; but plaintiff's counsel objected, and the court ruled that the book could not be introduced as evidence. To which ruling defendant by his counsel excepted.

After the case was submitted, and the court was about to charge the jury, the plaintiff's counsel asked leave to read the agreement or obligation in which the suit was founded to the jury, which leave being allowed, defendant by his counsel excepted.

Defendant by his counsel then moved the court to instruct the jury, that if they believed from the testimony that the plaintiff did not perform his part of the contract, then they should find for he defendant. The court gave this instruction, with the qualification that if the jury find that such non-performance on the part of the plaintiff was occasioned by the act of the defendant, then the defendant would be liable. To which qualification defendant by his counsel excepted.

James Gettis and *James T. Magbee,* for Appellant.

J. K. Glover, J. B. Lancaster and *M. Whit Smith,* for Appellee.

BALTZELL, C. J., delivered the opinion of the court.

This is an action of covenant on an obliagtion dated the 18th of January, 1853, between William B. Hooker, of the one part, and William H. Johnson of the other. William B. Hooker of the first part agrees and binds himself to fur-

nish three hands, negroes, to-wit: Nancy, Dick and Josh, two horses to plough and plenty of horse feed for the same, all to be furnished on the premises now occupied by said Hooker about four miles north of Fort Hamer in Hillsborough county, and the said Hooker further obligated himself to furnish sea island cotton seed, to plant say thirty three acres of said premises, and all other seeds necessary for planting, say corn, potatoes, cane, rice, &c., the balance of said premises, say 20 acres; also to furnish a sufficiency of teams to do all necessary hauling about the same. He also agrees and binds himself to furnish a sugar mill to grind the cane that may be made free of toll, also a cotton gin on the premises to pick the crop of cotton that may be made free of toll, and all necessary farming tools to cultivate the before mentioned premises. He further binds himself to furnish said Johnson and all others that may be with him, say his family, sons in law and families with provisions at the customary prices of the country for their use and consumption during the cultivation and gathering of the before mentioned crops. He also agrees to give said Johnson and others aforesaid, access to his cowpens to milk as much as they may want, &c., to furnish the present buildings for the use of the said families, also to build two other houses or rooms during the next spring for their use and occupation during the making and gathering the crop. For and in consideration of the before mentioned farm hands, horses, feed, &c., the said Hooker is entitled to have one equal half part of all the before mentioned crop.

And said Johnson obligates himself to cultivate to the best of his skill and ability the farm and premises, and gather and house the same as early as practicable, with three hands in conjunction with said negroes furnished by Hooker, said negroes to be furnished by Johnson. For and in consideration of said hands, &c., Johnson is entitled

to have and receive, one equal half part of the above mentioned crop, that is to say the crop of 1853.

It is alleged that the defendant did not perform his covenant in the several respects above stated by not furnishing seed corn, &c. There are five pleas to which a demurrer was filed, but this it is agreed applied only to the first and second, which were stricken out by order of the court, so that there remain but three, on which issue was joined which the jury was sworn to try.

These allege, 1st. That plaintiff hath not well and truly performed his part of the said contract. 2d. That whatever part of said contract was left unperformed by defendant was so left by reason of the non-performance by plaintiff of his part of said contract, and 3dly. That the plaintiff was indebted to defendant in a large sum of money on various accounts which he prays may be set off, &c. During the trial plaintiff offered two witnesses, who being sworn on their *voir dire*, one of them, Jesse Gibson, was questioned as to his interest, and answered, that "he was not interested in the result of the pending suit;" he was then asked if "he and the plaintiff had not agreed to plant the premises in the declaration mentioned in partnership before, at or after the said contract," but plaintiff objected and the court sustained the objection and refused to allow the witness to answer. Plaintiff's counsel informed the court and defendant's counsel that they withdrew their objections to the above interrogatories, but defendant by his counsel replied that they would impeach the testimony by other witnesses. With this view Seth Howard was asked by defendant what he knew in relation to the partnership of Jesse Gibson with plaintiff, in planting, &c., but the counsel for plaintiff objected, and the court sustained the objection.

This ruling of the court being excepted to, forms the

first question for our consideration. The rule for the rejection of a witness so situated is, that "where actual gain or loss would result simply and immediately from the verdict and judgment, he is incompetent, as where the proffered witness is a party, though but a nominal party to the suit, or is a party in benefiical interest, or where the immediate effect of the verdict will be to increase or diminish a fund in which he has a joint interest, as where a partner seeks to increase the joint funds or one jointly interested in the subject of the suit is called as a witness for the party, or in short, wherever the direct effect of the executed judgment as contradistinguished from its efficacy in establishing or evidencing any other right or claim or for any other collateral purpose would be to produce some benefit or make some prejudice to the proposed witness." 1 Starkie 108, 9.

In a note to the same note it is said, "a co-partner or party jointly interested in the subject of the suit has usually a direct interest in the particular subject as contra-distinguished from a mere liability to contribution. This seems to be generally true where he is jointly interested with the plaintiff in the subject of the suit, for he would be jointly entitled to the fruit of the proceeding when reduced into possession, whether it were in money or goods," &c. Ibid, note 9, p, 108.

The rule is further laid down in these terms, "in general where it is admitted or asserted that the proffered witness has a joint interest with the party who calls him either in the subject matter to be received or in the contract as a general partner, joint or part owner, or joint contractor, by which he has an interest in the very thing claimed or in the money to be recovered, or in the costs incidental to the suit, he is incompetent to give evidence for that party." 1 Starkie, 164.

It was proposed to show that the witness had an interest such as is here stated, and his answer if in the affirmative would have shown that he was a partner, or jointly or beneficially interested in the thing claimed. Viewed in this light we think the question was a proper one, and that the court should have permitted it. Nor do we think that the fact of the witness having answered that he had no interest, was any cause or sufficient reason for preventing further enquiry; the party was entitled to know his position and real situation—the facts of the case so as to test the accuracy of his belief or opinion.

We do not concur in the position of counsel of plaintiff that defendant, by questioning this witness on his *voir dire,* made the witness his own.

Defendant's counsel then proposed to introduce the book of defendant in which the original entries were made of the supplies the plaintiff had received from defendant, without first having introduced evidence to show that said book was a merchant's book, or to show the character of the book; but plaintiff's counsel objecting, the court ruled that the book could not be introduced as evidence, and this ruling was excepted to. In the absence of the book or its contents, without having the charges and entries before us, it is impossible for this court to say whether the court was right or wrong in this ruling. The exceptions should undoubtedly have given the entries and charges desired to be introduced, and if the original book was desirable, an order might be obtained for its inspection by this court. We cannot then say, under this state of the case, that the court erred in the exclusion of the book. Whilst we have come to this conclusion, as the subject may arise again, on the further trial of the case, it is proper that we should give a construction of the statute under which this testi-

mony is sought to be introduced. It is very brief, and is in the following words:

"Hereafter, in *all suits and actions at law or in equity,* the shop books and books of accounts of *either party* in which the charges and entries *shall have been originally made,* shall be admissible in evidence in favor of *either party: Provided,* that the credibility of such evidence shall be judged of by the jury in cases of trial at law, and by the court in case of a hearing in equity."—Laws 1854, p. 65.

"There are three points to be considered in the construction of all remedial statutes: the old law, the mischief and the remedy; that is, how the common (or old) law stood at the making of the act, what the mischief was for which the common (former) law did not provide, and what remedy the Legislature hath provided to cure this mischief. And it is the business of the judge so to construe the act as to suppress the mischief and advance the remedy."—I Blks. Com., 87.

The Supreme Court of the State had declared, in the case of Shehee vs. Higgs, decided at January term, 1852, that "a book account is not admitted in this State to be evidence of the sale and delivery of goods." They say: "The facts, though admitted by the demurrer to be true, that the witness was clerk and book-keeper for the plaintiff, and knew of the existence of the account and of its amount from an examination of the books, that the account filed was a correct transcript from the books and that he believed the books to be fairly and honestly kept, are not direct proofs of the assumpsit of the defendant, as charged in the declaration." In this State, they say, "we have not adopted the English rule, which is in perfect consistency with the law of evidence."—4 Florida Rep., 391. The judges differed in opinion, so that a definite rule

could scarcely be regarded as established by the decision. Referring to decisions of other States, we find a great diversity of opinion, some not admitting the books at all, others admitting them with qualifications.

An American author of great ability and distinction takes this view of the subject: "Though this evidence has been sometimes said to be admitted contrary to the rules of the common law, yet, in general, its admission will be found to be in perfect harmony with those rules, the entry being admitted only when it evidently was contemporaneous with the fact and part of the register. Being the act of the party himself, it is received with greater caution; but still it may be seen and inspected by the jury."—1 Greenleaf Ev., 205, § 118.

In a note, the same author says: "The rules of the several States in regard to the admission of this evidence are not uniform but in what is about to be stated, it is believed that they concur. Before the books of the party can be admitted in evidence, they are to be submitted to the inspection of the court, and if they do not appear to be a register of the daily business of the party, and to have been honestly and fairly kept, they are excluded. If they appear manifestly erased and altered in a material part, they will not be admitted, unless the alteration is explained. If objectionable in this respect, the party then is required to make oath in open court that they are the books in which the accounts of his ordinary business transactions are usually kept. He must also swear that the articles therein charged were actually delivered and the labor and services actually performed; that the entries were made at or about the time of the transactions and are the original entries thereof, and that the sums charged and claimed have not been paid.—Greenleaf, § 118, p. 215, n. 1.

In this state of uncertainty in our own State as to

whether the rigid and strict rule shall prevail, or the more relaxed one existing in other States, it was appropriate for the Legislature to assert the true law and thereby terminate the difficulties. This they have done by the law under consideration. They declare that the relaxed rule shall prevail that books shall be evidence, not absolutely, but with the qualification that "the entries and charges in it shall have been *originally made,*" by which we understand that there must be proof adduced to show, in the first instance, that they were so made. We think, also, that the law does not confine the privilege to merchants, but extends *to either party in all suits and actions,* whether merchants or not.

It is perceived that the law, whilst declaring that books shall be received in evidence, is silent as to the mode of their admission, except so far as it says that the books in which the charges and entries *shall have been originally made,* shall be admissible. Under such circumstances, we have no difficulty in saying that the wise and beneficent design of the Legislature would be best effected by holding, as we do, that the relaxed rule in operation in our sister States, with the restrictions and qualifications attached thereto, shall prevail here. This will secure and attain the end and object of the Legislature, and avoid the injury, mischief and frauds sure to attend the adoption of a more latitudinous construction.

After the case was submitted and the court was about giving instructions to the jury, the plaintiff asked leave to read the obligation on which the suit was founded to the jury, which having been allowed, an exception was taken. Undoubtedly the general rule is that all the testimony shall be given to the jury before the argument of the case, yet there are exceptions within the discretion of the court below. See United States Digest, 722, § 1497; 5 Dana, 504; 5 Metcalf, 412; 1 Hill, 300; 4 B. M., 575. And we think

that discretion was wisely exerted on the present occasion. It is indeed difficult to see how the case could have progressed at all without the obligation being before both the court and jury; it was part of the declaration and the substratum of the whole proceeding. As there was no plea denying it, the defendant is understood by the rules of law to have admitted so much of it as was spread upon the record. It was not then a contested point or matter about which defendants could have been surprised or desired to introduce other testimony. Why then non-suit the party on such account for no other than the vain and idle purpose of having another trial and doing a laborious work over again?

The defendant moved the court to instruct the jury that if they believed from the testimony that the plaintiff did not perform his part of the contract, then they should find for the defendant, which the court gave with a qualification that if the jury find that such non-performance on the part of the plaintiff was occasioned by the act of the defendant, the defendant would be liable.

It is insisted that the court erred in attaching this qualification, and we are inclined to that opinion. By referring to the issues which the jury were sworn to try, we find none alleging that a non-performance of the plaintiff was occasioned by defendant. If there be none, then there was no authority on the part of the court to give to plaintiff the advantage of a position he had not assumed in his pleadings. If the pleadings presented an immaterial issue, the remedy is not by instructions but by pleadings, raising the proper issue. We think then that under the issues before the jury the defendant was entitled to the instruction prayed for. As the case will be reversed for the reasons already stated, permission should be given to amend as well the declaration as the other pleadings so as to present the case fully and fairly upon the merits.

Decisions

OF THE

Supreme Court of Florida,

AT

MARCH TERM, 1856,

Held at Mariana.

JAMES M. BROWN, APPELLANT, VS. AMOS SNELL, APPELLEE.

1. Until the condition of a mortgage be broken and the same be actually foreclosed, the mortgagor and all claiming under him may maintain an ejectment to recover the possession of the mortgaged premises.
2. When the land of one individual is sold by the Tax Collector to pay the taxes due upon that particular tract, together with the taxes due upon other lands belonging to another individual, the sale is invalid, and the deed from the Tax Collector conveys no title.

Appeal from the Circuit Court of the Western Circuit for Jackson county.

DUPONT, J., delivered the opinion of the court.

At the trial of this case in the Circuit Court, a jury was waived by consent of the parties, and the court was called upon under the provisions of the statute, to give judgment upon the facts, as detailed in the record. A judgment was rendered for the plaintiff, the present respondent, and from

that judgment the defendant appealed, and assigns for error that the judgment should have been for the defendant. This state of the case renders it necessary that we, also, should look into the facts in order to determine the correctness of the ruling upon the points of law arising thereupon.

The action was an ejectment brought to recover the possession of two quarter sections of land situated in the county of Jackson. The evidence material to the issue is, that this land originally belonged to Amelia B. Blackwell and was by her *mortgaged* to the Union of Florida, prior to the year 1839. That on the 13th of December, 1838, Amelia B. Blackwell, by deed duly executed, conveyed the lands to Sidney S. Blackwell of the State of New York, which deed was duly recorded on the 4th of January, 1839. That Sidney S. Blackwell, on the 25th of September, 1854, conveyed the same to the lessor of the plaintiff.

The evidence further says that Amelia B. Blackwell died insolvent, and that administration on her estate was committed to S. Stephens, who repeatedly returned the land in controversy, together with other lands in Jackson county, to the Tax Assessor, as the property of the estate of his intestate; that upon the non-payment, by said administrator, of the taxes so assessed, the lands in controversy were advertised and sold as the property of Amelia B. Blackwell, by the Tax Collector, on the 3d day of January, 1851, at which sale the defendant purchased and went into possession.

Upon this state of facts the plaintiff below rested his right to recover, under his deed from Sidney S. Blackwell, and the defendant, his defence, under the deed from the Tax Collector.

The position assumed by the appellant is, that to warrant a recovery in ejectment, the plaintiff must show a

valid *legal title* to the premises, and that as the fee in the land is in the Union Bank of Florida, the mortgagee from Amelia B. Blackwell, the deed exhibited at the trial by the plaintiff conveyed only an *equitable* interest, to-wit: the right of redemption.

It is undoubtedly correct, as a general rule, that in order to enable a claimant to support an action of ejectment, he must be clothed with the legal title to the land; but it will be found that this doctrine does not apply where the outstanding title is a mortgage.

The tendency of judicial decisions has long been to consider the mortgage as a mere lien or security, and that the mortgagor remains in fact the real owner of the estate and seized of it against all persons but the mortgagee or his representatives, and that it may be conveyed and otherwise dealt with as the estate of the mortgagor. Such is now the well settled modern doctrine, and it is sanctioned by numerous English and American cases. In the case of the King vs. St. Michael's, 1 Doug. R., 632, Lord Mansfield remarks, "The mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security. It is an affront to common sense to say the mortgagor is not the real owner."

In Casborne vs. Scarfe, 1 Atkins, 606, Lord Hardwicke says: "The interest of the land must be somewhere and cannot be in abeyance; but it is not in the mortgagee, and therefore must remain in the mortgagors."

The same doctrine is sustained by Kent, C. J., in the case of Jackson vs. Willard, 4 John R., 42, who remarks as follows: "Mortgages have been principally the subject of equity jurdisdiction. They have been considered in those courts in their true nature and genuine meaning, and the rules by which they are governed are settled upon clear and consistent principles. The case is far different in a

court of law; and we are constantly embarrassed between the force of technical formalities, and the real sense of the contract. The language, however, of modern cases, is tending to the same conclusions which have been adopted in equity; and whenever the nature of the case would possibly admit of it, the courts of law have inclined to look upon a mortgage, *not as an estate in fee,* but as a *mere security for the debt.*"

Shaw, C. J., in commenting upon the subject in the case of Ewer vs. Hobbs, 5 Met., 3, remarks: "Herein it is that as between mortgagor and mortgagee, the mortgage is to be regarded as a conveyance in fee, because that construction best secures him in his remedy, and his ultimate right to the estate and its incidents, the rents and profits. But in all other respects, until foreclosure, when the mortgagee becomes absolute owner, the mortgage is deemed to be a lien or charge, subject to which the estate may be conveyed, attached, and in other respects dealt with as the estate of the mortgagor. And all the statutes upon the subject are to be so construed; and all rules of law, whether administered in law or in equity, are to be so applied as to carry these objects into effect."

Mr. Hilliard, in his admirable Treatise on Mortgages, has laid down the doctrine in clear and precise language, which bears directly upon the very question involved in the objection of the appellant. He remarks as follows: "The rule that a plaintiff in ejectment cannot recover premises, the title to which is in a third person, does not apply when the outstanding title is a mortgage. A mortgage constitutes a title when the mortgagee comes into court to enforce it; but, until then, the mortgagor is the owner. Upon the same principle, the mortgagor may maintain ejectment against one who claims by a conveyance in fee simple absolute from the mortgage. So, a mortgagor or

purchaser of the equity of redemption may maintain trespass against the mortgagee, or one acting under his license, where the defendant pleads *liberum tenementum,* and the plaintiff replies that the freehold was in himself; and, upon this ground, a mortgagor in possession gains a settlement." Hilliard on Mortgages, 109.

These authorities fully sustain the doctrine, that until the condition of a mortgage be broken, and the same be actually foreclosed, the mortgagor and all claiming under him may maintain an ejectment to recover the possession of the mortgaged premises; and, consequently, we hold that this case is not obnoxious to the first objection insisted on by the counsel for the appellant.

The next position assumed by the appellant is, that the statute gives a lien upon the particular piece of property for taxes due thereon; that the assessment of the tax creates a lien upon the thing itself, and not simply a debt against the owner of the property, and that, therefore, a purchase under a tax sale overrides any prior title to the property. This proposition it is unnecessary to decide, because it does not apply to the case before us, for the reason that it is shown by the evidence that the land in controversy was sold by the tax-collector, not to pay the taxes on this particular tract of land only, but for taxes due upon this and other lands which had been listed by the administrator of Amelia B. Blackwell as belonging to the estate of his intestate.

Now, the evidence in this case shows that the land in controversy had been sold by the intestate to Sidney S. Blackwell, who sold to the lessor of the plaintiff long prior to the tax sale, and to allow his land to be sold to pay the taxes due upon lands belonging to the estate of Amelia B. Blackwell would be to subject the property of one man to the payment of a debt due exclusively by another — a re-

sult which cannot be sustained upon any principle of law or equity. A purchaser at a tax sale purchases at his peril, and he must see to it that the sale is valid.

As these views are decisive of the rights of the parties, it becomes unnecessary that we should consider or determine the point made by the counsel for the respondent, which involves the question how far a deed of conveyance from the tax-collector shall be valid to convey an interest in the land where the premises are listed and sold as the property of one man, when in fact and in truth they were owned by another. It will be time enough to decide that question when a case shall arise in which its decision may become necessary.

Upon a review of the whole record, we are of the opinion that the court did not err in giving judgment for the plaintiff. Therefore let the judgment of the Circuit Court be affirmed with costs.

JOHN HURLEY'S EX'OR, APPELLANT, VS. FRANCIS ROCHE, APPELLEE.

1. The failure to join a defendant as joint contractor or partner is only pleadable in abatement, and cannot be taken advantage of as matter of variance at the trial.
2. When an account is presented to a party, according to the recollection of a witness, for over three hundred dollars, which defendant promised to pay, the jury should be instructed to find to the extent of the sum admitted.

Appeal from the Circuit Court for the Western Circuit.

BALTZELL, C. J., delivered the opinion of the court.

This was a suit instituted by plaintiff to recover the

amount of an open account, alleged to be due by defendant Roche to plaintiff's testator.

On the trial, Philip A. Carro was introduced as a witness by the plaintiff. Upon the account which was filed in the case being placed in his hands, he said that he had presented an account to the defendant for payment in favor of John Hurley, dec'd, for something over three hundred dollars, which defendant promised to pay; but he could not say that this was the same piece of paper, or that it contained the same items of charges, or any of them; thinks the account was against Francis Roche & Co., and that the goods were so marked which were sent to defendant.

Whereupon plaintiff's counsel moved the court to instruct the jury, that if the defendant admitted to Carro, witness, that any part of the amount was due, the jury may find for the plaintiff to that extent, without proof of the identical amount sued on; which instruction the court refused to give, but instructed the jury that if they were satisfied that the account submitted in evidence is substantially the same in its items of charges as that presented to defendant by witness, which defendant promised to pay, and are satisfied that the defendant promised to pay any part of the same, then they may find a verdict for so much of such amount as was proved that defendant promised to pay.

Samuel A. Leonard was also introduced as a witness, and said the account sued on was placed in his hands for collection; that he presented the account to defendant, which he promised to pay. The account which he presented was against Francis Roche & Co.

The court charged the jury, that they must, in order to find for plaintiff in this action, be satisfied from the testimony that the account sued on and presented at the trial

is substantially the same in its items of charges as the one presented by witness. The court also charged the jury, that if the account sued on and filed as the cause of action is against Francis Roche, and the account presented to the defendant, and which he promised to pay, was against Francis Roche & Co., there will be a variation between the evidence and the declaration, and plaintiff is not entitled to recover on such evidence. To these instructions, as given, and the refusal to give those asked, exception was taken, and they present the ground of error in this court.

It is conceded by defendant's counsel that there is error, as we are satisfied there was, in the refusal to give the instructions asked for, as well as in the instructions given.

The law is well settled, that the non-joinder of a defendant is pleadable in abatement and may not be objected to at the trial as matter of variance. The instructions asked for, too, we think, should have been given as being founded on obvious principles of law and right.

The judgment will be reversed and set aside and the case remanded for further proceedings not inconsistent with this opinion.

McMillan & Campbell vs. Archibald Savage.

The jurisdiction of the Circuit Court by the Constitution embraces all matters, civil and criminal, and therefore extends to and embraces a suit on a note for forty dollars.

This is an application for a *mandamus* to the Circuit Court of the Western Circuit.

The facts fully appear in the opinion of the court.

D. P. Holland, for the application.

T. J. Eppes, contra.

BALTZELL, C. J., delivered the opinion of the court.

This is an application to cause a suit instituted for the recovery of forty dollars, due by promissory note, to be reinstate by the Circuit Court.

It was dismissed, on account of the smallness of the sum, for the want of jurisdiction.

The Constitution of the State regulates the matter, and to it we must look as the guide for the determination of the question.

"The Circuit Court shall have original jurisdiction in all matters, civil and criminal, within this State not otherwise excepted in this Constitution."—Art. 5, sec. 6, Constitution.

This provision, it is admitted, embraces the case of the plaintiff, unless it is excluded by the exception, and it is insisted that the tenth clause of the same article, which declares "that justices of the peace shall possess such jurisdiction as may be provided by law." (Con., art. 5, sec. 10,) makes it. Not that this of itself has that effect, but that it has in connection with an act of the Legislature of 1842 giving to justices of the peace *exclusive jurisdiction* in suits for the collection of debts where the principle does not exceed the sum of fifty dollars.

It is sufficient to say that the exception to abridge the jurisdiction of the Circuit Court must be by the Constitution. To do this, and by this means to effect a repeal of a constitutional provision, there must be an express and direct declaration of the constitutional will. The grant of power to one tribunal does not necessarily exclude the possession of it by another. The clause granting the juris-

diction confers it *in all matters.* An exception to take this away should be clear and manifest, and not the result of mere implication.

Whilst considering this view conclusive, we find ourselves sustained by the action of the constitutional convention on the very clause under consideration. As originally proposed to that body, the clause contained, in addition to its provisions, these words: *"But in civil cases only where the matter in controversy exceeds twenty dollars."* On motion they were stricken out so as to relieve the provision of this limitation. There could have been but one design on the part of the Convention in this action, and this was not to abridge or limit the jurisdiction of the Circuit Courts in this respect.

The cause will then be reinstated on the docket of the Circuit Court.

It has not been the practice of the court to award a *mandamus,* conceiving that the intimation of the opinion of this court on the point would be sufficient to influence their action without the formal award of the writ.

LATHROP & WILKINSON, APPELLANTS, VS. AMOS SNELL APPELLEE.

Where the same individauls do business under different names or styles in two separate houses, the parties in interest being the same, their rights and liabilities as co-partners will not be affected thereby and they will be regarded as constituting one and the same firm; and, in such cases, a creditor whose debt is created in the name of and with one house, may proceed by garnishment to subject to his claim a debt contracted in favor of such copartners in the name of the other house.

Appeal from the Circuit Court of the Western Circuit.

For the facts of the case, see the opinion of the court.

J. F. McClellan, for Appellants.

Bush & Milton, for Appellee.

PEARSON, J., delivered the opinion of the court.

The plaintiffs brought their action by attachment against the defendants, and upon the return of *nulla bona* by the sheriff a summons in garnishment was issued and served upon the garnishee Amos Snell. The plaintiffs took judgment against the defendants, and Snell made his answer to the summons in garnishment, in which he admits that he is indebted to the late firm of Simmons, Stewart & Co., of Geneva, Alabama, in the sum of one hundred and ninety dollars.

The plaintiffs in their declaration complain of Elijah H. Simmons, Elijah J. Hays and John B. Simmons, surviving partners of the late firm of Simmons, Hays & Co., for that whereas the said defendants, together with one Austin J. Stewart, whom they have survived by and under the name, style and firm of "Simmons, Hays & Co.," made the several promises and assumptions upon which judgment was rendered against them. Upon the coming in of the garnishee's answer, it was proven by the confession of two of the defendants, and not controverted in argument, that the members of the copartnership doing business at Geneva, Alabama, under the style and firm of Simmons, Stewart & Co., were the identical persons carrying on their business under the style of Simmons, Hays & Co. at Elba, Alabama, and the copy of the note filed as the cause of action with the plaintiff's declaration, upon which judgment was rendered against the defendants, describes them in its body as of Elba, State of Alabama.

Upon this state of facts the plaintiffs moved for judg-

ment against the garnishee Snell, which was refused and the garnishment dismissed by the court below. To which ruling the plaintiffs excepted and bring their appeal.

It appears to us that the defendants must be regarded as co-partners, doing business both at Elba and Geneva and designating their different mercantile houses merely by a transposition of names. The parties were the same, and the debts due to either house were their common property. There was as perfect an identity of interest and liability in both houses as if the business had all been done at one counter. The fact that the name or style under which their business was transacted in the separate houses was different, when the parties in interest were the same, can make no difference in their legal rights or liabilities. The debt of Snell was due to the defendants in their co-partnership character, and to them only. The plaintiffs had the unquestionable right to subject it by process of garnishment to the payment of their debt.

The authorities relied on by the defendants are all cases where the separate interest of one partner in a firm was sought to be subjected to a debt for which his co-partners were not liable, and they show very clearly that such interest consists only in whatever share may remain to such partner after the co-partnership accounts are taken. The case here presented is entirely different and does not involve questions affecting the equities arising between co-partners themselves or the separate creditors of one of them.

The judgment must be reversed with costs and the case remanded, with directions to enter judgment against the garnishee.

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ABATEMENT.

The failure to join a defendant as joint contractor or partner is only pleadable in abatement, and cannot be taken advantage of as matter of variance at the trial. Hurly's ex'or vs. Roche, 746.

ACCOUNT.

Entries in the account book of a shop-keeper excluded as evidence where the proof was that they were made in two, three and sometimes four days after the transaction. They should have been made on the same day or the day after.

No objection that they were transcribed from a slate.

The charges should be definite, stating the quantity and kind of the article and price, and not accumulate and confound prices of different articles. Grady vs. Thigpin, adm'r, 668.

The statute of 1854, as to the admission of shop books and other accounts in evidence construed. Held, to adopt the liberal principle of the American courts with their restrictions, that it is not confined to merchants; that the entries to be admitted must be originally made or contemporaneous with the transaction; that the book must appear to be fairly kept, and free from erasures and interlineations, and the party make affidavit that the articles were delivered and the labor and services actually performed; that the entries were made at or about the time of the transactions and are the original entries and that the charges have not been paid. Hooker vs. Johnson, 730.

When an account is presented to a party, according to the recollection of a witness, for over three hundred dollars, which defendant promised to pay, the jury should be instructed to find to the extent of the sum admitted. Hurly's ex'or vs. Roche, 746.

AGENT.

An agent is a competent witness to prove his own authority if it be by parol.

AGENT— (*Continued.*)

He stands in the character of a disinterested and indifferent witness between the parties in all ordinary cases.

If the plaintiff recovers on his agency when in fact he was not agent, but had assumed an agency which could only be established by his own evidence, he would be answerable to the defendant; and if he assumed the character of agent without being authorized, and in such character imposed on the plaintiff he would be responsible to him.

Agents are witnesses, and in many cases they are so *ex necessitate*, even where they may be *intersted*.

The exception being founded upon consideration of public necessity and convenience, it cannot be extended to cases where the witness is called to testify, to matters out of the usual and ordinary course of business.

Where the agent has direct interest in the event of a suit relating to a contract made by him independently of his acts as agent, he is not a competent witness for his principal in regard to such contract. Croom vs. Noll, 52.

AGREEMENT.

Where there is an *express agreement* on the part of the stockholder to pay for the shares of stock allotted to him, upon default of such payment he may be proceeded against by *action* at the suit of the corporation, notwithstanding the Charter may provide for the forfeiture or sale of the shares of delinquents Barbee vs. Jacksonville and Alligator Plank R. Co., 262.

ANSWER— (*See* EVIDENCE.)

APPEALS.

Appeals may be taken from the Justice's Court to the Circuit Court and tried by the latter agreeably to the Constitution. *Exparte* Henderson, 279.

The Supreme Court has no authority to entertain an appeal from a judgment rendered in a Justice's Court. Otoway vs. Devall, 302; Halliday vs. Jacksonville and Alligator Plank R. Co., 303.

The Supreme Court cannot entertain an appeal or writ of error in a case at law, until after a final judgment. McKinnon vs. McCollum, 376.

The provision of the statute which prescribes the time within which appeals from the Justices' Court to the Circuit Court may be taken, has reference to the *adjournment* of the court, and not to the date of the *rendition* of the judgment.

Where the record furnishes no evidence at what time the court adjourned, the presumption of law is that the justice, in approving the appeal bond, did

APPEAL—(*Continued.*)

his duty, and that the same was perfected within the time prescribed by the statute. In the absence of proof to the contrary, the legal presumption always is that the officer has acted strictly within the line of his duty.

It is not a compliance with the requisition of the statute to merely pray the appeal within the three days. It must be perfected within that time by the actual payment of the costs and the tender of the appeal bond. Summerlin vs. Tyler, 718.

ASSIGNMENT.

A debtor in insolvent circumstance may, before lien attaches, lawfully prefer one creditor, or set of creditors to another.

A sale, assignment or other conveyance, is not necessarily fraudulent because it may operate to the prejudice of a particular creditor.

In an assignment to a trustee who accepts the trust, and enters upon the duties thereof for the use of certain creditors, the legal estate passes and vests in the trustee, and chancery will compel the execution of the trust for the benefit of the said creditors, though they be not at the time assenting, and parties to the conveyance.

A deed of assignment is to be construed by the *res gestae*, and thus courts are permitted to look to the circumstances and motives which led to its execution, and the objects to be accomplished. Bellamy vs. Bellamy's Adm'r. 62.

ATTACHMENT.

The provision contained in the 4th paragraph of the 3rd Section of the Act of 1834, (Thomp. Dig., 370,) which requires that "the evidence shall be confined strictly and exclusively to the state of facts alleged in the plaintiff's affidavit, as they existed at the time of issuing the attachment" has reference only to cases *pending* at the time of the passage of the act.

The decision in the case of Kennedy vs. Mitchell, (4 Florida R. 457,) which is an adjudication upon the proviso contained in the 5th paragraph of the same section, referred to and approved.

It is a general rule to be observed in the construction of statutes that where they provide extraordinary remedies, they should be strictly construed. But in view of the fact that there exists no provision for *"special bail"* in this state, that rule may be somewhat relaxed in its application to the attachment laws, whenever by so doing the cause of justice may be advanced.

A debtor may by his declarations of intention, or avowal of design, in regard

ATTACHMENT—(*Continued.*)

to the *fraudulent* disposal of his property, bring himself as effectually under the operation of the statute, as by the commission of any overt act, either consummated or in progress of consummation.

It is a safe rule to be adopted in respect to the admission of evidence on the trial of the issue of *fraud or no fraud,* arising under the attachment law, that the evidence whether consisting of avert acts, or mere declarations of intention,shall not have transpired at so remote a period as to prevent their becoming a part of the *res gestae,* and the determination of this, must be left to the sound discretion of the Judge, presiding at the trial of the issue. Hardee vs. Langford, 13.

ATTORNEY'S LIEN.

The statute regulating "commissions for collecting" between attorneys and clients, relates only to per centage for collecting. For *other* services a reasonable and adequate remuneration may be allowed, to be ascertained by proof and either and both of them constitute in this state,what is known and spoken of in this country and in England as "Fees" and "costs," between attorney and client,and constitutes a *lien,*which should be enforced under the same rules of law as in England, where those fees and costs are taxable so far as consistent with our practice.

The right of set-off prevails in general cases, so as to interfere with the solicitor's lien upon the debt recovered, but where *other claims* arising out of different transactions and which could not have been a legal or equitable set-off in that suit exist between the parties, the court will not divest the lien of the attorney or solicitor, which has already attached on the amount recovered for the costs of that particular litigation. Carter vs. Bennett, 214.

AVERMENT.

All averments in a declaration which need not be made, or proved when made, may be stricken out or disregarded in the proof, except when they touch the identity of that which is necessary to be proved. When they go to fix the identity, they become matters of description and must be proved as laid. Burritt vs. Doggett, 332.

BILL OF EXCEPTIONS.

Unless the testimony in the case is brought before the Supreme Court by a bill of exceptions, it connot regard it.

The bill of exceptions is given by the statute of Westm., 13 Ed. I., Chap. 31.

It ought to be upon some point of law arising upon the facts.

BILL OF EXCEPTIONS—*Continued.*

It is not to draw the whole matter into examination again; it is only for a single point, and the truth of it can never be doubted after it is sealed.

When there is no bill of exceptions to show on what ground the court decided, it will be presumed that it decided correctly.

The office of a bill of exceptions is to give the facts on which the court decided, and it should give all the facts bearing upon the decision. Bailey vs. Clark, 516.

BOND.

It is not necessary that the bond in an action of replevin, should contain a description of the property, but the affidavit must describe it.

Statutory bonds will, in general, be sustained as voluntary bonds, good at common law, although they may not be taken pursuant to the statute, unless the statute has expressly declared them void, or they have been obtained by fraud, or by coercion or oppression, *colore officii*. Branch vs. Branch, 314.

BOUNDARY.

In a case of contested boundary, course and distance yield to natural objects, and distance to be extended or shortened to conform to them.

Where parties having an interest in a common boundary, as owners of grants adjoining, agree to a dividing line, and especially where a town is laid out by Commissioners predicated on such agreement, and the property is held thereunder for a great number of years, this is conclusive as against them and those holding under them, and parol testimony is good and admissible to prove such agreement.

It is not proper for the court to charge the jury that circumstantial evidence tending to show a probability that a survey covered the land in dispute, is sufficient to found their verdict.

Reputation and hearsay, of themselves, are not evidence; yet, in connection with other evidence, they may be entitled to respect in cases of boundary after great length of time, and when it may be impossible to prove the existence of the primitive land marks. Doggett vs. Wiley, 482.

CERTIORARI.

Under the latitude given in the *proviso*, to the second section of the fifth article of the Constitution, the Supreme Court has authority to issue writs of *certiorari*, to any of the inferior jurisdictions; but to obtain its action upon the same, it must be clearly shown, that the case presented is such a one as requires the interposition of the court, in order that justice may be done. Halliday vs. Jacksonville and Alligator Plank R. Co., 304.

CIRCUIT COURTS. (*See* JURISDICTION.)

CONSTITUTION.

The act of the General Assembly, incorporating the Jacksonville & Alligator Plank Road Company, is not in conflict with nor does it contravene either the 24th Section of the 1st Article, or the 4th Section of the 13th Article of the Constitution of the State. Barbee vs. Jacksonville and Alligator Plank R. Co., 262.

The grant of one power by the Constitution is not necessarily exclusive of another power.

The trial of an appeal case by the Circuit Court, is rather the exercise of original than appellate jurisdiction, but whether original or appellate the exercise of the power is not in conflict with the Constitution of the State. *Exparte* Henderson, 279.

The act of 1845 which restricts the jurisdiction of the Supreme Court to the entertainment of "causes brought by appeal or writ of Error from the several Circuit Courts, when the matter in controversy exceeds in amount or value fifty dollars" is compatible with the provisions of the constitution, and that court is not authorized to take or exercise jurisdiction of a cause in which the matter in controversy is below that limit.

The several acts of the General Assembly granting an appeal from the judgment of a Justice of the Peace, to the Circuit Court do not contravene any provision of the Constitution and are imperative upon the courts Anderson vs. Brown. 299.

Under our State Constitution it is the appropriate function of the judicial department to decide whether a statute of the Legislature, be or be not constitutional; but in deference to a co-ordinate branch of the Government, it ought never to nullify a statute, except in a case free from doubt.

In proceeding to define and determine the constitutional power of the Legislative department, it is proper to note the characteristic difference which marks our Federal and State Constitutions. Whilst the former contains only specific grants of powers, the latter makes a general grant of all the political power of the people, restrained only by specific reservations. Hence in determining upon the validity of statutes the acts of Congress are to be construed with greater stringency, than the acts passed by our General Assembly.

No certain rule can be prescribed by which to determine when a work of internal improvement shall be deemed to be embraced within the meaning of the phrase, "County purpose" as the same is used in the 4th clause of the 8th article of the State Constitution. Neither the *locality* of the work, nor

CONSTITUTION—(*Continued.*)

the anticipated *benefit* to be derived from it, is of itself a certain test; but as furnishing a general rule, the concurrence of the two would seem to be required.

Whether the 2d section of 8th article of the State Constitution imposes an imperative *restriction* upon the taxing power of the General Assembly, and such an one as can be enforced by the judicial department, or whether it is only discretionary: *Quere?*

The act of subscription to the capital stock of the Pensacola and Georgia Railroad Company, by the Board of County Commissioners of Leon County, is within the meaning of the phrase "County purposes" as used in the Constitution of the State.

The word "necessary" occurring in the 2d clause of the 8th article of the Constitution and by implication transferred to the 4th clause of the same article, when applied to the taxing power of the county authorities is to be taken rather as an indication of a grant of *discretion*, to be exercised within the appropriate limits of their general power, than as a restraint upon that power.

The provision of the act, which required that a subscription of the stock of the Railroad Company, by the County Commissioners, should depend upon a vote of the qualified voters of the county, was not a delegation to the people of legislative powers, but only a legitimate mode of obtaining an expression of the will of the constituent, as a guide for the action of the representative.

writ of Error from the several Circuit Courts, when the matter in controver-

The provision contained in the act, that each taxpayer should receive a remuneration in the shape of Stock in the Railroad Company, equivalent to the amount of his tax assessment, is not in conflict with either the 1st or 24th clauses of our "Declaration of Rights."

The provision of the act which authorizes the counties to issue Bonds for the purpose of raising money to pay for stock to be purchased, does not contravene the letter or spirit of the 13th clause of the 13th article of the Constitution, which prohibits the General Assembly from pledging the faith and credit of the State to raise funds in aid of Corporations.

The 22d section of the act of the General Assembly of 1855, entitled "An act to provide for and encourage a liberal system of Internal Improvements in this State," declared to be constitutional. Cotten et al, vs. Co. Commissioners, 610.

CONTRACT.

The general principle adopted by civilized nations is, that the nature, validity and interpretation of contracts, are to be governed by the *lex loci* of the country where the contracts are made or are to be performed; but the remedies are to be governed by the *lex fori*. Perry vs. Lewis, 555.

The law of the place where a contract is made is, generally speaking, the law by which the contract is to be expounded, but it is nevertheless, the right of this government to prescribe rules and regulations for the protection and enjoyment of all property which shall be brought within its territorial jurisdiction.

The 3d section of the Act of 1823, with reference to fraudulent conveyances (Thomp. Dig., 217, c, 11, §1,) requires, that where the *possession* of personal property in one person and the *use* in another, in order to protect it against liability for the debts or contracts for the person in possession, the deed by which it is held must be recorded within five years. Whether or not this section is applicable to contracts made out of this State: *Quere?* Crowell et al. vs. Skipper, 580.

CONVEYANCE.

It is essential to the conveyance of real estate that there should be some description of the land. Bellamy vs. Bellamy, Adm., 62.

CORPORATION.

Whether a corporation can maintain an action upon an *implied* promise for the collection of assessments made on the shares of stock owned by a corporator, and whether the mere *subscription* for stock, raises an implied assumpsion, quere?

Where there is an *express agreement* on the part of the stockholder to pay for the shares of stock allotted to him, upon default of such payment, he may be proceeded against by *action* at the suit of the corporation notwithstanding the Charter may provide for the forfeiture or sale of the shares of delinquents. Barbee vs. Jacksonville Plank Road Company, 262.

CRIMINAL LAW.—(*See* INDICTMENT.)

The degree of strictness spoken of in the books as applicable to criminal jurisprudence, is such as is comformable to rational principles, and not such as is calculated to defeat the ends of the law. Cherry vs. The State, 679.

DECREE.

A decree in favor of the husband of a daughter against the father and grantor of property settled to the use of grantor and wife during their natural lives, is conclusive as to the life interest, right of possession and power of alienation of the grantor. Sanderson vs. Jones, 430.

DEMURRER.

If the defendant demur to the whole declaration and any one of the counts

DEMURRER—(*Continued.*)

be good, the plaintiff shall have judgment upon the count.

The failure to file a "bill of particulars," cannot be taken advantage of by demurrer to the declaration. Barbee vs. Jacksonville & Alligator Plank Road Company, 262.

Where a plea is required to be verified by an affidavit, the failure to append the affidavit is not a ground of *demurrer*. The subject can be taken advantage of only by motion to the court to set aside the plea, or to sign judgment as for want of a plea. Hagler vs. Mercer, 342.

A demurrer opens all the pleadings, and the court should give judgment against the party who committed the first error (in substance) in pleading.

The copy of the cause of action required by the statute to be annexed to the declaration, is no part of the declaration and cannot be reached by demurrer. Hooker vs. Gallagher, 351.

On overruling a demurrer, if the demurrant resorts to ulterior pleadings on the same point, the demurrer is waived. Bailey vs. Clark, 516.

DISCRETION.

It may be laid down as a safe rule, that every presumption is to be in favor of the ruling of the court below, where the same is made in reference to any point, which at common law, was a matter purely of *discretion*; to induce the appellate court to control that discretion, it must be made manifest that injustice or injury has been done to the rights or interests of the party asking its interference. Ahren & Hyer vs. Willis, 359.

EJECTMENT.

Until the condition of a mortgage be broken and the same be actually foreclosed, the mortgagor and all claiming under him may maintain an ejectment to recover the possession of the mortgaged premises. Brown vs. Snell, 741.

EQUITY—(*See* INJUNCTION.)

In equity, the general maxim of *pari delicto*, &c., does not always prevail; circumstances of the particular case, often form exceptions, and where it is necessary relief will be granted. Bellamy vs. Bellamy, Adm., 62.

A second suit will not be allowed when it appears that a judgment, whether by confession, upon demurrer or verdict, and still in force, has been rendered in a former suit, by a court of competent jurisdiction, for the same subject matter, for the same purpose, and a trial was had upon the merits. The

EQUITY—(*See* INJUNCTION)—(*Continued.*)

same rule prevails in courts of law and equity, but there are instances forming exceptions to this general rule in which, under peculiar circumstances, equity will entertain a second suit for the same cause of action and the same purpose.

It is not a sufficient ground to entertain a bill in equity that on a trial of the same question in a suit at law, upon an issue involving the merits, the jury gave a verdict for the defendant, because of an instruction by the court that if they believed the evidence, the right to sue at law was not in the plaintiffs but another person, or that the plaintiffs should go into a court of equity, though that instruction was erroneous. The only way of avoiding such an instruction are by taking a non-suit before the jury retired, or obtaining a reversal of the judgment.

If a party intends to rely upon a matter as constituting a ground for relief in equity, it ought to be sent up in the bill; if not so set up, though it appears by the evidence in the record to have been proved, it will not be considered at the hearing. Thornton et al. vs. Campbell's Ex'or, 546.

There is no rule of law or principle of equity which prevents a first mortgagee from purchasing the mortgaged property when sold at sheriff's sale under a judgment prior to the mortgage; and, in such case, he takes absolute title.

When a surplus remains after the satisfaction of a prior execution under which property mortgaged has been sold, equity will regard the fund as substituted for the land, and pursue and distribute the same amongst subsequent mortgagees according to their priorities.

The court will not consider the validity of a bargain and sale of real estate between parties who make no objection to the transfer, at the instance of another, whose rights whose rights are not affected thereby. Harrison vs. Roberts, 711.

ERROR.

It is error for the court to give a judgment by default as for want of a plea when there is a good plea in the case upon which issue has been joined. Hooker vs. Gallagher, 351.

In a suit by executors or administrators, who have received their letters testamentary or of administration in another State, it is error to instruct the jury that the plaintiffs cannot recover without producing the probate of the will or letters of administration duly obtained, &c., and properly authenticated. Sullivan et al. ex'ors vs. Honaker, 372.

It is error to submit an issue upon one plea to the jury, while other pleas

ERROR—(*Continued.*)

remain undisposed of, when it appears that they were not abandoned. McKinnon vs. McCollum, 376.

The court cannot assume the conclusiveness of the testimony of any witness, and it is error so to charge.

The court will not regard an assignment of error not connected with or necessary to the merits of the case.

Whilst the ruling of the court may be erroneous in some respects, the court will not reverse the judgment if the verdict is sustained by the evidence. Doggett vs. Willey, 482.

EVIDENCE

The provision contained in the 4th paragraph of the 3rd section of the Act of 1834, (Thomp. Dig., 370,) which requires that "the evidence shall be confined strictly and exclusively to the state of facts alleged in the plaintiff's affidavit, as they existed at the time of issuing the attachment," has reference only to cases *pending* at the time of the passage of the act.

It is a rule to be adopted in respect to the admission of evidence, on the trial of the issue of *fraud or no fraud*, arising under the attachment law, that the evidence, whether consisting of overt acts or mere declaration of intention, shall not have transpired at so remote a period as to prevent their becoming a part of the *res gestae*, and the determination of this must be left to the sound discretion of the Judge, presiding at the trial of the issue. Hardee vs. Lanford. 13.

The answer of a defendant is only evidence as to facts, to which other testimony could be received, and it will not be admitted to show that the intent and meaning of the parties to a written agreement was contrary to what appears on the face of it. Carter vs. Bennett, 214.

When a plaintiff declares in assumpsit on a promissory note, he cannot properly be permitted to give in evidence, a sealed instrument as the foundation of his action. Hooker vs. Gallagher, 351.

It is not proper for the court to charge the jury that circumstantial evidence tending to show a probability that a survey covered the land in dispute, is sufficient to found their verdict.

Reputation and heresay, of themselves, are not evidence; yet, in connection with other evidence, they may be entitled to respect in cases of boundary after great length of time, and when it may be impossible to prove the existence of the primitive land marks. Doggett vs. Willey, 482.

Where a defendant, who is sued in equity by an administrator for the re-

EVIDENCE—(*Continued.*)

covery of a slave alleged to belong to the estate of his intestate, sets up an absolute title to the same and relies upon a bill of sale from the intestate directly to himself to support his claim, if the other evidence in the cause shows that the slave was in possession of the intestate at the time of his death, and had so continued from the date of the bill of sale, and that a stranger took possession of her immediately after that event, and there is no evidence to negative the idea that the defendant obtained his possession from such stranger, the acts and declarations of the latter, so far as they are immediately connected with his possession, may be admitted as evidence with respect to the character of the defendant's title. McDougall, adm'or, vs. Van Brunt, 570.

In case of a charge of poisoning, chemical tests and analysis of the contents of the stomach and bowels are essential to the ascertainment of the truth, and should be resorted to in all cases where there is no direct proof of the act.

Symptoms, of themselves, without other circumstances, are not reliable, and cannot be regarded as conclusive evidence of guilt.

A new trial will be granted where there is evidence of symptoms alone, and those imperfect, no tests to ascertain the presence of poison, none discovered or traced to the prisoner and no motive or other fact proved to induce the presumption of guilt. Joe vs. The State, 591.

Entries in the account book of a shop-keeper excluded as evidence where the proof was that they were made in two, three and sometimes four days after the transaction. They should have been made on the same day or the day after.

No objection that they were transcribed from a slate.

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EVIDENCE—(*Continued.*)

not been paid.

As a general rule evidence must be given to the jury before the case is submitted and the judge gives his charge, yet there are exceptions, and the omission to read the obligation declared on, which is admitted by the pleadings, is one of these. Hooker vs. Johnson, 730.

When an acount is presented to a party, according to the recollection of a witness, for over three hundred dollars, which defendant promised to pay, the jury should be instructed to find to the extent of the sum admitted. Hurly's ex'or vs. Roche.

EXCEPTIONS.

When no exception is taken to the charge of the court below, in a criminal case, and a motion was made for an arrest of judgment and for a new trial without alleging it as a ground for such motion there, it is too late to make the objection in the Supreme Court. Francis, a slave, vs. The State, 306.

EXECUTORS AND ADMINISTRATORS.

If an executor or administrator receive assets of the estate sufficient to satisfy his debt due from the testator or intestate, this, at *common law*, operates an extinguishment of his demand.

But the provision of the statute, which takes away the right of retainer in cases of *insolvency*, so far modifies this doctrine as to confine its operation exclusively to solvent estates.

When a defendant sets up as a bar to the action that the plaintiff in the character of executor had received assets sufficient to satisfy his debt, it is neither necessary nor proper *that* the *plea* should allege that the estate was solvent: but if an insolvency is relied upon to bring the case within the operation of the statute, the fact should be distinctly averred in the *replication* by way of avoidance. Sealey vs. Thomas, ex'r, &c., 25.

Upon the death of the testator or intestate, if any injury is afterwards done to his goods and chattels, the executor or administrator may bring an action for damages for the tort, and under the circumstances, he has his option either to sue in his representative capacity and declare *as* executor or administrator, or to bring the action in his own name and in his individual character.

When such a suit is brought by an executor or administrator, in his individual character, it is not necessary that there should be a bond binding the estate.

Whether such a bond is necessary where an executor or administrator sues in such a case, in his representative character as executor or ad-

EXECUTORS AND ADMINISTRATORS—(*Continued.*)

ministrator: *Quere?*

In a suit by an executor or administrator, in his representative character, he must describe himself and make his claim *as* administrator or executor only; describing himself executor or administrator is mere *descriptio personae.*

The statute declares that the plaintiff in replevin, *or* some other competent person *in his behalf,* shall execute the bond with good and sufficient security; it is not contemplated by the latter provision that the persons signing the bond should bind anybody but themselves. Whether, therefor, an executor or administrator can, even in such an action as this, by proceeding as such executor or administrator, and executing a bond *as* such, bind the estate: *Quere?* Branch vs. Branch, 314.

In a suit by executors or administrators, who have obtained their letters testamentary or of administration in another State, it is error to instruct the jury that the plaintiffs cannot recover without producing the probate of the will, or letters of administration duly obtained, &c., and properly authenticated.

Whether such letters have been duly obtained or not, is a question to be settled in another stage of the case.

Whether they are properly authenticated or not, is a question for the court not the jury.

Every executor or administrator when he sues as *such,* should make profert of his letters testamentary or of administration.

The defendant by craving over of the letters and putting in the proper plea, may avail himself of the want of title of such plaintiff to sue.

By pleading the general issue *only,* he waived all objections to such letters, and admits the plaintiff's right to sue *as such* executor or administrator.

The omission of the profert when necessary, is now aided, unless the defendant demurs specially for the defect. Sullivan et al., ex'rs. vs. Honacker, 372.

EXTINGUISHMENT.

The doctrine that a "personal action once in suspense by the act of the party entitled to it, is always extinguished,"—questioned.

If an executor or administrator receive assets of the estate, sufficient to satisfy his debt due from the festator or intestate, this, at *common law,* operates an estinguishment of his demand. Sealey vs. Thomas &c., 25.

FRAUD AND FRAUDULENT CONVEYANCES.

A sale, assignment or other conveyance, not necessarily fraudulent because it may operate to the prejudice of a particular creditor.

A deed made with the purpose or intent to hinder, delay or defraud creditors, is binding as between the parties; but as to creditors it is deemed to have no lawful existence. Bellamy vs. Bellamy's Adm., 62.

The 3rd Section of the Act of 1823, with reference to fraudulent conveyances, (Thomp. Dig. 217, c. 11, §1,) requires that where the *possession* of personal property is in one person and *use* in another, in order to protect it from liability for the debts or contracts of the person in possession, the deed by which it is held must be recorded within five years. Whether or not this section is applicable to contracts made out of this State. *Quere?* Crowell et al. vs. Skipper. 580.

GAMING.—(*See* INDICTMENT.)

GRAND JURY.—(*See* INDICTMENT.)

HUSBAND AND WIFE.

The husband is entitled during his life to the income of property settled upon himself and wife jointly, as acompensation for his liability to maintain her; he is entitled to the whole of the profits of the trust estate when supporting the expenses of the household. Sanderson vs. Jones, 430.

INDICTMENT.

In an indictment for gaming, it is unnecessary to state the name of the game played or bet upon.

An allegation that it was at "a certain game of cards" is sufficient.

The name of the person with whom the bet was made must be stated, or it must be alleged that such person was to the jurors unknown.

The common law declares that an indictment for an offence against the statute,must with certainty and precision charge the defendant to have committed or omitted,the acts under the circumstances, and with the intent mentioned in the statute.

The place was sufficiently stated, by saying (after stating the venue) in the County of Leon, and at a certain game of cards. Groner vs. The State, 39.

The indictment of a slave need not state the name of the owner of such slave.

A slave indicted for an assault and battery, not alleged to have been committed upon a white person, should be tried under the 6th section of the Act of November 21st, 1828, entitled "An Act relating to crimes and

INDICTMENT—(*Continued.*)

misdemeanors committed by slaves, free Negroes and Mulattoes."

When the record contains a copy of the indictment endorsed by the Foreman of the Grand Jury, *A True Bill,* and a plea of not guilty has been put in, a trial had, a verdict of guilty found, and motion for an arrest of Judgment made and argued, without an objection that it does not appear by the record that the Grand Jury returned the Bill into Court endorsed by the Foreman, "*A True Bill,*" the objection cannot be made in the Supreme Court on appeal in a case not capital. Francis, a slave, vs. The State. 306.

When an indictment has upon it the indorsement of the title of the case together with a comprehensive designation of the offence charged, this court will, in view of the practice which is known to prevail in the circuit courts, in regard to matters of this kind, view such indorsement as the act of the prosecuting officer, whose duty it is to prepare the bills; and the words of "A true bill," which is the act of the Grand Jury, will be taken to refer to the offence as charged in the body of the indictment, and not to that designated in the indorsement.

Such indorsement of the prosecuting officer, is to be received only as a memorandum for the convenience of reference, and to distinguish the paper from others of a similar character. It constitutes no part of the indictment—it imparts no vitality, nor does it give any validity to the instrument.

The Grand Jury have the right to qualify and limit their findings to any extent they may deem proper, under the circumstances and facts which may be developed in the investigation of the case; but such qualification or limitation must not be presumed. The finding must be taken to be general and referable solely to the offence *as charged in the body of the indictment,* unless it can be reasonably inferred from the collocation of the words, that such qualification or limitation were intended to be made.

It will not be permitted to distort the finding of the jury, by forcibly connecting the words of the finding with the incomplete description of the offence, to be found in the usual indorsement of the prosecuting attorney.

Every portion of the record that comes up from the Circuit court is entitled to equal credit; and if implicit credence is to be given to that portion which sets out the finding of the jury, as recorded in the minutes of the court, the same degree of credence is to be given to that portion which connects the finding with, and makes it applicable to the particular bill of indict-

INDICTMENT—(*Continued.*)

ment set out in the record. Such an *identity* between the record of the finding and the particular bill of indictment, to which it is made to apply, as will leave no room for mistake or doubt, is all that is necessary. Cherry vs. The State, 679.

INJUNCTION

An injunction will be granted upon *motion and without notice,* whenever the giving of the notice would probably accelerate the injury complained of in the bill of complaint. The peremptory requisition for the giving of notice provided for in the statute regulating chancery proceedings, is limited and restricted to application "*to stay proceedings at law.*"

When the answer fully denies all the circumstances upon which the Equity of the bill is founded, it is the usual practice to dissolve the injunction. But there is no *inflexible* rule to this effect for the granting or continuing of the injunction, must always rest in the sound discretion of the court, to be governed by the nature of the case. Allen vs. Hawley, 142.

Carter vs. Bennett, 214.

A court of equity will not enjoin a judgment at law and grant a new trial in case of negligence and inattention of a plaintiff to the defence of his suit.

It is not proper to dissolve an injunction or dismiss a bill for want of a suitble bond for costs or for insufficient notice or non-payment of costs; the court should correct the error if possible, without resort to this alternative. Gamble vs. Campbell, 347.

"Equity will enjoin the collection of the purchase money of land, on the ground of defect of title, after the vendee has possession under a conveyance from the vendor with general warranty, if the title is either prosecuted or threatened, or if the purchaser can shew clearly that the title is defective."

On a motion for injunctionafter answer,the court will look only to the facts that are responsive to the bill, and will presume against defendant when he has not answered when he ought to have answered.

Where a new equity is set up by the answer to avoid that set up by the bill the court will not regard it on the motion.

On a motion for an injunction, the court will not commit itself to points or questions that may arise at the final hearing. Yonge & Bryan vs. McCormick, 368.

INJUNCTION—(*Continued.*)

The principle affirmed in the case of Carter vs. Bennett, et al. 6 Flor. R. 236 viz: that when all the equities of the bill are denied by the answer, it is not of course to dissolve the injunction. The granting and continuing of injunctions rest in the discretion of the court to be governed by the nature and circumstances of the case—cited and approved.

When the facts, circumstances and law of the case presented in the bill and answer afford a strong presumtion that the cpmplainant may be entitled to relief upon the final hearing, and in the mean time might suffer irremediable injury, the injunction should be continued to that period notwithstanding the general denial of the equities of the bill, in the answer. Linton vs. Denham & Palmer, 533.

INSTRUCTIONS.

The instructions of the court to the jury should be confined to the issue made by the pleadings, even although this be immaterial. Hooker vs. Johnson, 730.

IRREGULARITY.

Applications to set aside proceedings for mere irregularity, should be made as early as possible. Branch vs. Branch, 314.

JUDGMENT.

A judgment recovered in the state of Georgia, as to matters of evidence, is entitled to full faith and credit in this State, but the same faith and credit are not due to subsequent acts under it, such as issuing and returning of execution thereon, and until said judgment has been prosecuted in a court of this State, judgment recovered and execution issued and pursued to every available extent, the plaintiff is but a creditor at large.

Where promissory notes are offered in evidence and ruled out by the court, and not offered again, and where the mortgage given to secure said notes is also offered in evidence, but in consequence of said notes not being in evidence, the said mortgage and assignment thereof, were not and could not have been *fully considered and determined* by the Jury, and there were other issues before the Jury, a judgment rendered under such circumstances should not be considered as a final and conclusive adjudication in respect to said mortgage and the ownership of said mortgage. Carter vs. Bennett, 214.

It is error for the court to give a judgment by default, as for want of plea when there is a good plea in the case upon which issue has been joined. Hooker vs. Gallagher, 351.

Whilst the ruling of the court may be erroneous in some respects, the court will not reverse the judgment if the verdict is sustained by the evidence. Doggett vs. Willey, 482.

JUDGMENT—(*Continued.*)

Every fair intendment is to be made in support of the judgment below. Bailey vs. Clark, 516.

The lien of a judgment at law attaches to and binds the real estate of the defendant therein, acquired subsequent to the rendition thereof. Harrison vs. Roberts, 711.

Where a clerk had failed to enter judgment on an order of court to that effect at one term, it is proper to have it done thereafter at the next term. Hagler vs. Mercer, 721.

JURISDICTION.

In cases where it is doubtful whether courts of law can give relief, courts of chancery will entertain jurisdiction. Carter vs. Bennett, 214.

The Circuit Courts are not confined wholly to cases of original jurisdiction.

They have for the most part the power of the court of King's Bench in England.

A mandamus will lie from this court to the Corcuit Court in case of refusal to entertain jurisdiction when directed by law.

The jurisdiction of the Circuit Courts and Supreme Courts compared.

The trial of an appeal case by the Circuit Court is rather the exercise of original than appellate jurisdiction, but whether original or appellate the exercise of the power is not in conflict with the Constitution of the State. *Ex parte* Henderson, 279.

The act of 1845, which restricts the jurisdiction of the Supreme Court to the entertainment of "causes brought by appeal or writ of error from the several Circuit Courts, when the matter in controversy exceeds in amount or value fifty dollars," is compatible with the provisions of the Constitution, and that court is not authorized to take or exercise jurisdiction of a cause in which the matter in controversy is below that limit.

Where the judge of a Circuit Court shall refuse to entertain jurisdiction of an appeal taken from a Justice's Court, a writ of *Mandamus*, issuing from the Supreme Court, is the appropriate process to compel the exercise of that jurisdiction. Anderson vs. Brown, 299.

Under the latitude given in the *proviso* to the second section of the fifth article of the Constitution, the Supreme Court has authority to issue writs of *certiorari* to any of the inferior jurisdictions; but to obtain its action upon the same, it must be clearly shown, that the case pre-

JURISDICTION—(*Continued.*)

sented is such an one as requires the interposition of the court in order that justice may be done. Halliday vs. Jacksonville and Alligator Plk. R. Co., 304.

A second suit will not be allowed when it appears that a judgment, whether by confession, upon demurrer or verdict, and still in force, has been rendered in a former suit, by court of competent jurisdiction, for the same subject matter, for the same purpose, and a trial was had upon the merits. The same rule prevails in courts of law and equity, but there are instances forming exceptions to this general rule in which, under peculiar circumstances, equity will entertain a second suit for the same cause of action and the same purpose.

It is not sufficient ground to entertain a bill in equity that on a trial of the same question in a suit at law, upon an issue involving the merits, the jury gave a verdict for the defendant, because of an instruction by the court that if they believed the evidence, the right to sue at law was not in the plaintiffs but another person, or that the plaintiffs should go into a court of equity, though that instruction was erroneous. The only way of avoiding such an instruction is by taking a nonsuit before the jury retired, or obtaining a reversal of the judgment.

If a party intends to rely upon a matter as constituting a ground for relief in equity, it ought to be set up in the bill; if not so set up, though it appears by the evidence in the record to have been proved, it will not be considered at the hearing.

When a Court of Equity has concurrent jurisdiction with a Court of Law, of a question which has been already tried at law, the Court of Equity will not entertain a suit to try the same question, because of some matter of which the plaintiff could have availed himself had he first sued in equity. Thornton et al. vs. Campbell's Ex'or, 546.

The jurisdiction of the Circuit Court by the Constitution embraces all matters, civil and criminal, and therefore extends to and embraces a suit on a note for forty dollars. McMillan & Campbell vs. Savage, 748.

JURY.

During the trial of any case not capital, the court may, in the exercise of a *sound discretion*, permit the jury under the proper charge, to separate. Francis, a slave, vs. The State, 306.

LIMITATIONS, STATUTE OF.

That portion of the period of prescription which has run under the limitation laws of another State, cannot be united with the time which has elapsed under the laws of this State, so as to complete a statutory

LIMITATIONS, STATUTE OF—(*Continued.*)

bar of the right of action.

The rule is that a foreign statute of limitations is inoperative except in cases where it not merely professes to bar the remedy, but goes directly to the extinguishment of the debt, claim or right. Perry vs. Lewis, 555.

MANDAMUS.

A mandamus will lie from this court to the Circuit Court in case of refusal to entertain jurisdiction when directed by law. Ex-parte Henderson, 279.

Where the judge of a Circuit Court shall refuse to entertain jurisdiction of an appeal taken from a Justice's Court, a writ of *mandamus*, issuing from the Supreme Court, is the appropriate process to compel the exercise of that jurisdiction. Anderson vs. Brown, 299.

MARRIAGE SETTLEMENT.

Where a marriage settlement is made by husband and wife *in trust to the use and behoof of husband and wife during their natural lives*, it is by no means clear that a separate estate in created for the wife.

The husband is entitled during his life to the income of property settled upon himself and wife jointly, as a compensation for his liability to maintain her; he is entitled to the whole of the profits of the trust estate when supporting the expenses of the houshold.

A sale of personal property by a husband, under a marriage settlement as aforesaid, held good as to a daughter to the extent of the interest of the father,especially where there is no-allegation that the husband has not property to maintain the wife, and does not maintain her. Sanderson vs. Jones, 430.

MARRIED WOMEN.

Where a deed of gift in trust for the separate use of a married woman was made in Alabama, by parties living there at the time of its execution, the laws of that State as to the rights of the parties under it, as administered by her judicial tribunals form the rule of decision of the case. Her Courts having adopted the English rule as to the right of disposition of the *feme* in a case where there was no restriction or discretion in the instrument, their ruling was held applicable and conclusive as to the rights of the parties.

In a deed of gift of property to the separate use of the wife, having no words of restriction or direction as to alienation,thepower of disposition is incident to the ownership, and she may dispose of it as if she were a *feme sole*.

The English and New York rule to this extent, approved and adopted.

MARRIED WOMEN—(*Continued.*)

A married woman will not be protected or sustained in a course of double dealing, calculated to involve an innocent purchaser, and throw upon him the loss to arise from improper action of her husband. Maiben et al. vs. Bobe, 381.

MORTGAGE.

To constitute a trust or Equitable Mortgage, there must be a specific agreement between the parties in interest, and to be affected by it; there must also be a valuable consideration.

The case of Phillips vs. Hawkins, 1 Florida, R. 362, commented on and explained.

A sale of mortgagee's interest under execution does not confer a complete title in personally, but gives the mortgagee's rights subject to redemption by the mortgagor. Cotten vs. Blocker et al., 1.

In case of a mortgage to secure notes payable at different periods, the note which first falls due has the prior right to be satisfied out of the mortgaged property, unless there is some peculiar equity attached to the notes of subsequent date, and so as to the other notes.

In case of sale by a prior incumbrancer, the subsequent incumbrancer can only complain by showing fraud in the sale, or that the property was more than sufficient to pay both debts, and that something remains for his benefit. Wilson & Herr vs. Hayward, 171.

A mortgage executed in Georgia on slaves and real estate then in Ga., and said slaves *subsequently* removed to Fla., and the equity of redemption therein sold at a reduced value, under an agreement that they are purchased *"subject to all the liabilities against them, in the way of debt either by note, judgment, or mortgage in the State of Georgia, as the property of the vendor or mortgagor, the vendor only warranting the same against himself and his* heirs," and afterward removed from the State, some by the party complainant, and some by the defendant, and there being equities tangible, such as the Court of Chancery may seize hold of *in rem* and *force* the return of said slaves within the jurisdiction of the court, or decree a personal liability, may not be foreclosed in a Court of Chancery having jurisdiction in this State, on the slaves, as if they were in Florida within the jurisdiction of the court, without embracing the real estate or any other property in Georgia, included in said mortgage, and forming *no part* of said purchase;

MORTGAGE—(*Continued.*)

but any transaction or acts of the mortgagee or holder of the mortgage, in Georgia, which in equity and good conscience, under all the circumstances of the case, should be a set-off, or reduction, or credit on the indebtedness of the mortgage, will enure to the purchaser of the equity of redemption. Carter vs. Bennett, 214.

There is no rule of law or principle of equity which prevents a first mortgagee from purchasing the mortgaged property when sold at sheriff's sale under a judgment prior to the mortgage; and, in such case, he takes absolute title.

When a surplus remains after the satisfaction of a prior execution under which property mortgaged has been sold, equity will regard the fund as substituted for the land, and pursue and distribute the same amongst subsequent mortgages according to their priorities. Harrison vs. Roberts, 711.

Until the condition of a mortgage be broken and the same be actually foreclosed, the mortgagor and all claiming under him may maintain an ejectment to recover the possession of the mortgaged premises. Brown vs. Snell, 741.

NEW TRIAL.

Bill for a new trial not contenanced, and never should be entertained except in a very clear case of fraud or injustice, or upon newly discovered evidence, which could not *possibly have been produced* at the first trial. Carter vs. Bennett, 214.

When no exception is taken to the charge of the court below, in a criminal case, and a motion was made for an arrest of judgment and for a new trial, without alleging it as a ground for such motion there, it is too late to make the objection in the Supreme Court. Frances, a slave, vs. The State, 306.

A new trial will be granted where there is evidence of symptoms alone, and those imperfect, no tests to ascertain the presence of poison, none discovered or traced to the prisoner and motive or other fact proved to induce the presumption of guilt. Joe vs. The State, 591.

NOTICE.

Notice to the creditors to file their claims does not sustain a bar under the statute. The statute should be strictly pursued and its terms complied with. Cotten vs. Blocker et al., 1.

OATH.

The oath of office of Commissioner of roads and bridges need not be administered by a Justice of the Peace, but may be administered by certain other officers.

Whether if Road and Bridge Commissioners were not sworn at all.

OATH—(*Continued.*)

their acts would, for *that cause,* be null and void; *Quere?* McKinnon vs. McCollum, 376.

OFFICER.

A Clerk of the Circuit Court may appoint a deputy.

A ministerial office may be exercised by deputy.

A deputy may, in general, do any act that his principal could do, except to make a deputy. McKinnon vs. McCollum, 376.

PARTNERS AND PARTNERSHIP.

As a general rule, the several owners of a merchant vessel or steamboat, hold their respective interests therein, as *tenants in common* and not as co-*partners,* and consequently are to be governed by the rules of law, applicable to that species of tenure. But to this rule there may be *exceptions,* either growing out of the express agreement of the parties,or to be implied from the nature and character of the business or adventure in which they may be engaged.

Where partnership funds are invested in the purchase of a steamboat, in the absence of any positive stipulations between the part owners to the contrary, they will hold their respective interests in *strict partnership* and the property will be subject to the law of partnership. The case of "Loubat vs. Nourse," (5 Florida Rep., 350,) referred to and approved.

Whenever the intervention of a Court of Equity becomes necessary,in consequence of dissentions or disagreements between the copartners, to effect a settlement or closing of the partnership concerns,upon bill filed by any of the partners,showing either a *breach of duty* on the part of the other partners or a *violation of the agreement* of partnership a Receiver will be appointed as a matter of course.

Each of the co partners has a *specific lien* on the partnership stock,not only for the amount of his share, but for monies advanced by him beyond that amount for the use of the copartnership, and the share of each, is the proportion of the residue, on the balance of account.

In all cases of a partnership at will, whether the contract was originally of that nature,or has become so by effluxion of time, or from other circumstances, a Court of Equity will, upon a dissolution, decree a sale of the entirety of the partnership effects, at the desire of any of the parties.

A Court ofEquity has no authority to appoint a Receiver, with a view permanently to carry on the business of a partnership, but there is no impropriety in directing the Receiver to superintend the business, during the pendency of the legal proceedings instituted for the purpose of dissolving the partner-

PARTNERS AND PARTNERSHIP—(*Continued.*)

ship. Allen vs. Hawley, 142.

Where the same individuals do business under different names or styles in two separate houses, the parties in interest being the same, their rights and liabilities as co-partners will not be affected thereby and they will be regarded as constituting one and the same firm; and, in such cases, a creditor whose debt was created in the name of and with one house, may proceed by garnishment to subject to his claim a debt contracted in favor of such copartners in the name of the other house. Lathrop & Wilkinson vs. Snell, 750.

PLEAS AND PLEADING.

When a defendant sets up as a bar to the action that the plaintiff in the character of executor had received assets sufficient to satisfy his debt, it is neither necessary nor proper *that* the *plea* should allege that the estate was solvent: but if an insolvency is relied upon to bring the case within the operation of the statute, the fact should be distinctly averred in the *replication* by way of avoidance.

It is the first essential of good pleading that it be characterized by *certainty*, and this quality is especially requisite in the replication. Sealey vs. Thomas, ex'r, 25.

Where a plea is required to be verified by an affidavit, the failure to append the affidavit, is not a ground of *demurrer*. The subject can be taken advantage of, only by motion to the court to set aside the plea, or to sign judgment as for want of a plea.

The twenty-fourth section of the act of November 23d, (Thomp. Dig., 331,) is restricted to pleas alleging a *want* of consideration, and does not apply where the allegation is a *failure* of consideration.

And even where the *want* of consideration is pleaded, the only effect of that section is to change the burthen of proof. The defendant may still plead a want of consideration, without vertifying his plea by an affidavit; but in such case, he takes upon himself the *onus probandi*, as he formerly did at common law. Hagler vs. Mercer, 342.

Under the operation of "Reg, Gen." (Hill. Term, 4 W. 4,) which have been adopted for the regulation of the practice in the Circuit Courts, where a defendant intended to rely upon either a want of consideration, or a failure, or illegality of consideration as a defence to the action, he shall set forth in his plea so much of the facts or circumstances connected with the

PLEAS AND PLEADING—(*Continued.*)

transaction, as may be necessary to apprise the plaintiff fully, of the specific nature and character of the defence which he will be required to meet. Ahren & Hyer vs. Willis, 359.

Every executor or administrator, when he sues *as such*, should make profert of his letters testamentary or of administration.

The defendant, by craving oyer of the letters and putting in the proper plea, may avail himself of the want of title of such plaintiff to sue.

By pleading the general issue *only*, he waives all objection to such letters, and admits the plaintiff's right to sue *as such* executor or administrator. ....

The omission of the profert when necessary is now aided, unless the defendant demurs specially for the defect. Sullivan et al., ex'ors vs. Honacker, 372.

It is error to submit an issue upon one plea to the jury while other pleas remain undisposed of, when it appears that they were not abandoned. MKinnon vs. McCollum, 376.

A declaration upon such a note by a holder, other than the payee, is defective in substance if it does not allege that the note was endorsed. Hooker vs. Gallagher, 351.

PRACTICE.

The rule that allowed a party who offered no evidence the closing argument, has been repealed.

As has also the rule which allowed a default for want of a plea, &c., to be entered in vacation. Bailey vs. Clark, 516.

The appearance by attorney of a party summoned as a garnishee, cures any defect in the service of the writ of garnishment. Mercer vs. Booby, 723.

From the terms of the statute providing for the commencement of suits in the court of common law, it is clearly deducible that the debt or damages sued for, as set forth in the praecipe, ought to be inserted in the summons ad *respondendum;* but the omission by the clerk to do so does not render the summons void.

Where an amendment in the original process is allowable, the Supreme Court, upon error brought, will give to the party entitled thereto the same benefit of the amendment as though it had been actually made.

A defect or irregularity which is *apparent* upon the face of the original writ or summons, (if the same is not carried into the declaration) is not the subject of plea in abatement. It can be taken advantage of only by motion to

PRACTICE—(*Continued.*)

quash.

Only matters extrinsic or *dehors* the writ or summons can be so pleaded. Campbell vs. Chaffee et al., 724.

PRESUMPTION.

It may be laid down as a safe rule, that every presumption is to be in favor of the ruling of the court below, where the same is made in reference to any point which at common law was a matter purely of *discretion;* to induce the appellate court to control that discretion, it must be made manifest that injustice or injury has been done to the rights or interests of the party asking its interference. Ahren & Hyer, vs. Willis, 359.

PRINCIPAL AND AGENT.

The instruction of the Circuit Judge in this case was, that the principal, the person hiring a negro slave, was responsible for his loss through carelessness or misconduct of his agent; again, that if an agent hears that a negro cannot swim, and gives an order which no prudent man with this knowledge would give, he is responsible for the injury resulting from such improper act; held that this ruling was right. Kelley, Timanus & Co., vs. Wallace, 690.

PROCESS.

If the style of process is "The State of Florida," it is sufficient. Branch vs. Branch, 314.

PROFERT.—*See* PLEAS AND PLEADING.)

PROMISSORY NOTES.

The endorse of an *over-due* promissory note takes it as against the maker, with all the equities arising out of the note transaction itself, but not subject to set off in respect to a debt due from the endorser to the maker of the note, arising out of collateral matters.

This doctrine rests upon the law merchant which forms a part of the common law. The statute of set off does not apply to it. Kilcrease vs. White, 45.

A promissory note, payable to A. B. or *order*, must be endorsed by the payee to enable the holder (other than the payee) to sue upon it *in his own name.*

A declaration upon such a note by a holder, other than the payee, is defective in substance if it does not allege that the note was endorsed. Hooker vs. Gallagher, 351.

PUBLIC PROPERTY.

That the Pensacola and Georgia Railroad Company, is a private corporation, affords no valid reason why the shares of its capital stock, purchased by and on behalf of the county of Leon, should not be deemed to be the public property of the citizens of the county. Cotten et al. vs. County Commissioners, 610.

RECEIVER.

Whenever the intervention of a court of equity becomes necessary, in consequence of dissentions or disagreements between the co-partners to effect a settlement or closing of the partnership concerns, upon bill filed by any of the partners, showing either a *breach of duty* on the part of the other partners or a *violation of the agreement* of partnership, a Receiver will be appointed as a matter of course.

A court of equity has no authority to appoint a Receiver with a view permanently to carry on the business of a partnership, but there is no impropriety in directing the Receiver to superintend the business during the pendency of the legal proceedings instituted for the purpose of dissolving the partnership.

If a Receiver either exceed or abuse his authority, as defined by the terms of the order making the appointment, and injury or damage thereby result to any of the parties in interest, they have their remedy on his bond. But such transcending or abusing of his authority cannot, on appeal, be urged against the validity of the order. Allen vs. Hawley, 142.

REHEARING.

The court will act upon a petition for a rehearing where it was presented in time, although two of the judges who sat on the hearing of the cause have, since the decree was made, gone out of office. Lines vs. Darden, 37.

REMAINDER-MEN.

If the remainder-men, the children provided for after the termination of the life estate, have a fear that the property is in danger of being diverted and squandered, and they have such interests against the purchaser from the father, their remedy is by bill *quia timet*. Sanderson vs. Jones, 340.

REPLEVIN.

It is not necessary that the bond, in an action of replevin, should contain a description of the property, but the affidavit must describe it.

The value of the property as stated in the declaration, is not the criterion of the value of the property; it is the estimated value (by the clerk, whose duty it is to approve the bond,) at the time the bond is given, and the plaintiff, by stating in his declaration a higher value, cannot invalidate the bond.

If the Clerk in approving the bond add to his name the word Clerk only, it is sufficient if the other proceedings which occurred at the same time as the making of the affidavit, or the issuing of the writ, show of what Court he was Clerk, and that it is the same into which the writ is returnable.

The court may order a pluries writ, in an action of replevin under our statute, or the plaintiff may (in a proper case) cause one to be issued

REPLEVIN—(*Continued.*)

without an order of the court.

By suing out an alias writ, the plaintiff waives (for the time being, at least,) his right under the statute to declare in trover or trespass. Branch vs. Branch, 314.

RES GESTAE.

A deed of assignment is to be construed by the *res gestae*, and thus Courts are permitted to look to the circumstances and motives which led to its execution, and the objects to be accomplished. Bellamy vs. Bellamy's Adm'r, 62.

SALE.

A sale of mortgagee's interest under execution does not confer a complete title in personalty. but gives the mortgagee's rights subject to redemption by the mortgagor. Cotton vs. Blocker, et al., 1.
by the mortgagor. Cotton vs. Blocker, et al., 1.

SET-OFF.—(*See* PROMISSORY NOTE.)

SLAVE.—(*See* INDICTMENT.)

The instruction of the Circuit Judge in this case was, that the principal, the person hiring a negro slave, was responsible for his loss through carelessness or misconduct of his agent; again, that if an agent hears that a negro cannot swim, and gives an order which no prudent man with his knowledge would give, he is responsible for the injury resulting from such improper act; held that this ruling was right.

From the evidence, it appeared that the negro, lost by drowning in the service of the defendants, was a green hand at the mill—afraid of water—was near drowning before, having been rescued by others,a fact known to the superintendent; that the employment he was put to was dangerous and requiring great expertness in getting logs out of a pen in the water of the depth of from two and a half to eight and ten feet deep: Held, under these facts, that the order was illegal and improper, and defendants liable for the loss. Kelly, Timanus & Co. vs. Wallace, 690.

STATUTE

It is a general rule to be observed in the construction of statutes, that where they provide extraordinary remedies, they should be strictly construed. But in view of the fact that there exists no provision for *"special bail"* in this State, that rule may be somewhat relaxed in its application to the attachment laws, whenever by so doing the cause of justice may be advanced. Hardee vs. Langford, 13.

STATUTORY BAR.

Notice to creditors to file their claims does not sustain a bar under the statute. The statute should be strictly pursued and its terms complied with. Cotten vs. Blocker et al., 1.

TAX SALE.

Where the land of one individual is sold by the Tax Collector to pay the taxes due upon that particular tract, together with the taxes due upon other lands belonging to another individual, the sale is invalid, and the deed from the Tax Collector conveys no title. Brown vs. Snell, 741.

TRESPASS.

Trespass, *quare clausum fregit,* is a local action in which the plaintiff is required to prove that the place is within the jurisdiction of the Court, and the defendant may show by testimony that it is not within it.

A plea that a difference exists between the States of Georgia and Florida as to whether the premises lie within the jurisdictional limits of the State of Georgia or the State of Florida; that the premises are claimed by the state of Georgia to be within her jurisdiction; that no line has been run and marked defining the boundary between the States; that A. having judgment and execution on recovery of a claim of land against one M., the sheriff by virtue thereof executed the writ by putting out the goods and chattels of plaintiff L and delivering possession to defendant, as agent of the plaintiff in execution, is not a good bar to the action. McMillan vs. Lacy, 526.

TRUST AND TRUSTEE.

In an assignment to a trustee who accepts the trust and enters upon the duties thereof for the use of certain creditors, the legal estate passes and vests in the trustee, and chancery will compel the execution of the trust for the benefit of the said creditors, though they be not at the time assenting and parties to the conveyance.

In a deed of trust, wherein after specifying certain slaves by name and also enumerating other personal property, and then adding a general clause, viz: *"and all his personal effects of every name, nature and description,"* &c. Held to embrace things *ejusden generis,* with those which had been mentioned before, and to convey for the purpose of the trust,any other slaves, which then belonged to the grantor and not before specified by name and especially where the *res gctiae* favors that construction, but not to pass real estate, or equity of redemption in land.

In a deed of assignment to a trustee conveying *"all the future cotton crop made on said plantation,"* an estate is conveyed commensurate with the trust; and although it does not pass the equity of redemption in said land, yet it is fiduciary license,lease or conveyance thereof,and of all that was necessary to the management of the plantation and appropriation of said crops for the objects and purposes of said trust.

In all cases where a purchase has been made by a trustee, on his own ac-

count, of the estate of his *cestui que* trust, although sold at public auction it is in the option of the *cestui que* trust to set aside the sale, whether *bona fide* made or not, and particularly where there are inequitable features in the transaction.

A trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which have a tendency to interfere with his duty in discharging it. Bellamy vs. Bellamy's adm'r, 62.

The trusts intended by the courts of equity, not to be reached or affected by the statute of limitations are those technical and continuing trusts which are not at all cognizable at *law*, but fall within the proper, peculiar and exclusive jurisdiction of the Court of Equity.

A person purchasing mortgaged or encumbered slaves at a very reduced price "*subject to all the liabilities that are against them in the way of debt, either by note, judgment or mortgage, as the property of the mortgagor, the mortgagor only warranting the same as against himself and heirs*" and the great reduction in the price being unexplained must be considered to have purchased only the equity of redemption therein. And as between the parties, Courts of Equity will consider the justice, equity and understanding of the purchase to be, that any encumbrance in the way of debt, *then* existing against said slaves, either by *note, judgment* or *mortgage,* as the property of the vendor, were to be met and paid by the purchaser, to any amount not exceeding the value of the slaves, at the time said liability shall be enforced; and such a purchase constitutes a constructive trust in *rem* in favor of the owner of said encumbrances or any of them, such as Courts of Chancery only will enforce. Carter vs. Bennett, 214.

Where a deed of gift in trust for the separate use of a married woman was made in Alabama by parties living there at the time of its execution, the laws of that State as to the rights of the parties under it, as administered by her judical tribunals, form the rule of decision of the case. Her courts having adopted the English rule as to the right of disposition of the *feme* in a case where there was no restriction or discretion in the instrument, their ruling was held applicable and conclusive as to the right of the parties. Maiben et al. vs. Bobe, 381.

Where a marriage settlement is made by husband and wife *in trust to the use and behoof of husband and wife during their natural lives,* it is by no means clear that a separate estate in created for the wife.

TRUST AND TRUSTEE—(*Continued.*)

The husband is entitled during his life to the income of property settled upon himself and wife, jointly, as a compensation for his liability to maintain her; he is entitled to the whole of the profits of the trust estate when supporting the expenses of the household.

Trusts are alienable, and a husband may sell and dispose of his life interest in such property. Sanderson vs. Jones, 430.

USE AND OCCUPATION.

When in an action for use and occupation, the lot, square, town and county where the premises are situated, are set out in the declaration; *Held, first,* that this was a matter of description and must be proved as laid; *Second,* that it was unnecessary to have alleged any location of the premises; *Third,* that if it had appeared to have been the intention of the plaintiff to have made the averment of the place where the premises were situated, refer to the venue, or if it was doubtful, whether the design was to make the averment matter of discription or matter of venue, it would be considered as venue, in order to prevent a failure of recovery, because of the unnecessary averment, but when there is no such doubt, the averment must be considered as matter of description and must be proved as laid. Burrett vs. Doggitt, 332.

VARIANCE.

The failure to join a defendant as joint contractor or partner is only pleadable in abatement and cannot be taken advantage of as matter of variance at the trial. Hurly's ex'or vs. Roche, 746.

VENDOR AND VENDEE.

As a general rule, the vendor of goods having possession and selling them as his own, is held bound in law to warrant the title, and therefore, he is generally not a competent witness for the vendee in support of the title.

But it does not follow that the vendor of goods is necessarily interested or bound to warrant the title. He may not have been in the possession of the goods when he sold them, or he may have sold them *without recourse;* or he may have a *release* from the purchaser. Croom vs. Noll, 52.

Equity will enjoin the collection of the purchase money of land, on the ground of defect of title, after the vendee has possession under a conveyance from the vendor with general warranty, if the title is either prosecuted or threatened, or if the purchaser can shew clearly that the title is defective. Yonge & Bryan vs. McCormick, 368.

WITNESS.

An agent is a competent witness to prove his own authority if it be parol. He stands in the character of a disinterested and indifferent witness between the parties in all ordinary cases.

Agents are witnesses, and in many cases they are so *ex necessitate*, even where they may be *interested*.

The exception being founded upon consideration of public necessity and convenience, it cannot be extended to cases where the witness is called to testify to matters out of the usual and ordinary course of business.

Where the agent has a direct interest in the event of a suit relating to a contract made by him independently of his act as agent, he is not a competent witness for his principal in regard to such contract.

Notwithstanding the *prima facie* appearance of an interest on the part of the witness on the face of the record, yet his evidence ought not to be rejected without examining him on his *voir dire* as to his *situation*, or adducing other proof to show that fact.

The disqualifying interst must be some certain, legal and immediate interest, however minute, either in the event of the suit or in the record, as an instrument of evidence, in support of his own claims in a subsequent action.

The mode of *proving the interest of a witness*, is either by his own examination or by evidence *aliunde*.

When the objection to the competency of the witness arises from his *own examination*, he may be further interrogated to facts tending to remove the objection, though the testimony might, on other grounds, be inadmissible.

As a general rule, the vendor of goods having possession and selling them as his own, is held bound in law to warrant the title, and therefore, he is generally not a competent witness for the vendee in support of the title. Croom vs. Noll, 52.

Where a witness has a joint interest with the party for whom he is called to testify, either in the subject matter to be recovered or in the contract as a general partner, joint or part owner, or joint contractor, by which he has an interst in the very thing claimed or in the money to be received, he is incompetent.

Although a witness has answered that he is not interested in the result of the suit pending, this does not prevent a further examination into his real

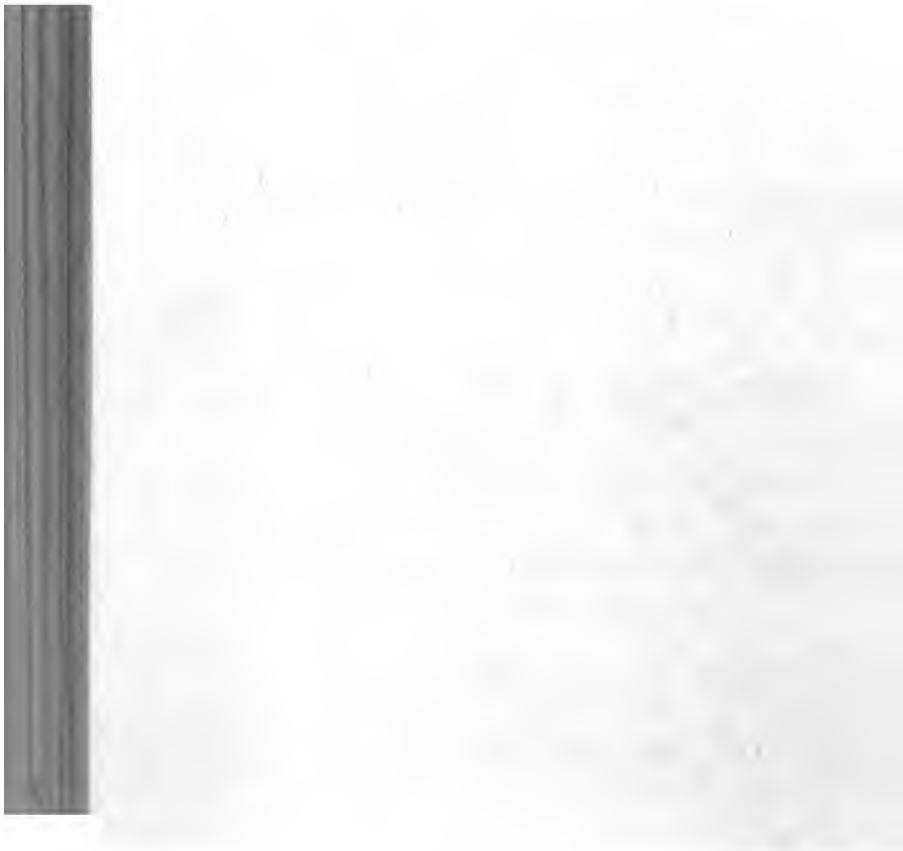
WITNESS—(*Continued.*)

situation and the facts of the case as to his interest. Hooker vs. Johnson, 730.

WRIT.

The court may order a pluries writ, in an action of replevin under our statute, or the plaintiff may (in a proper case) cause one to be issued without an order of the Court.

By suing out an alias writ, the plaintiff waives (for the time being at least,) his right under the statute to declare in trover or trespass. Branch vs. Branch, 314.



REPORTS

OF

CASES ARGUED AND ADJUDGED

IN THE

Supreme Court of Florida,

AT

TERMS HELD IN 1855-'6.

By MARIANO D. PAPY, Reporter.

VOLUME VI.

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JUDGES OF THE SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

HON. THOMAS BALTZELL, CHIEF JUSTICE.
HON. CHARLES H. DUPONT, } ASSOCIATE JUSTICES.
HON. BIRD M. PEARSON,* }

MARIANO D. PAPY, ATTORNEY-GENERAL.

JUDGES OF THE CIRCUIT COURTS

HON. WILLIAM A. FORWARD, JUDGE EASTERN CIRCUIT.
HON. THOMAS F. KING, JUDGE SOUTHERN CIRCUIT.
HON. J. WAYLES BAKER, JUDGE MIDDLE CIRCUIT.
HON. JESSE J. FINLEY, JUDGE WESTERN CIRCUIT.

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* Elected in place of Hon. T. DOUGLAS, deceased, who presided during the terms held in 1855.

ERRATA.

For "Henry Anderson," at page 299, read "Henry Henderson."

For "The Supreme Court has authority to entertain an appeal coming up directly from a Justice's Court," at page 303, read "The Supreme Court has *no* authority," &c.

Read head-note No. 2, at page 382, as follows: "In a deed of gift of personal property to the separate use of the wife, having no words of restriction or direction as to alienation, the power of disposition is incident to the ownership, and she may dispose of it as if she were a *feme sole.*"

At page 328, for "*jiri*" read "*juri*"

At page 482, for "Daggett vs. Willey" read "Doggett vs. Willey."

On page 304, head-notes, second line, read "the Supreme Court has no authority," &c.

Many other errors, typographical and of punctuation, have unavoidably crept in, but which may be detected by the reader without being specially pointed out here.

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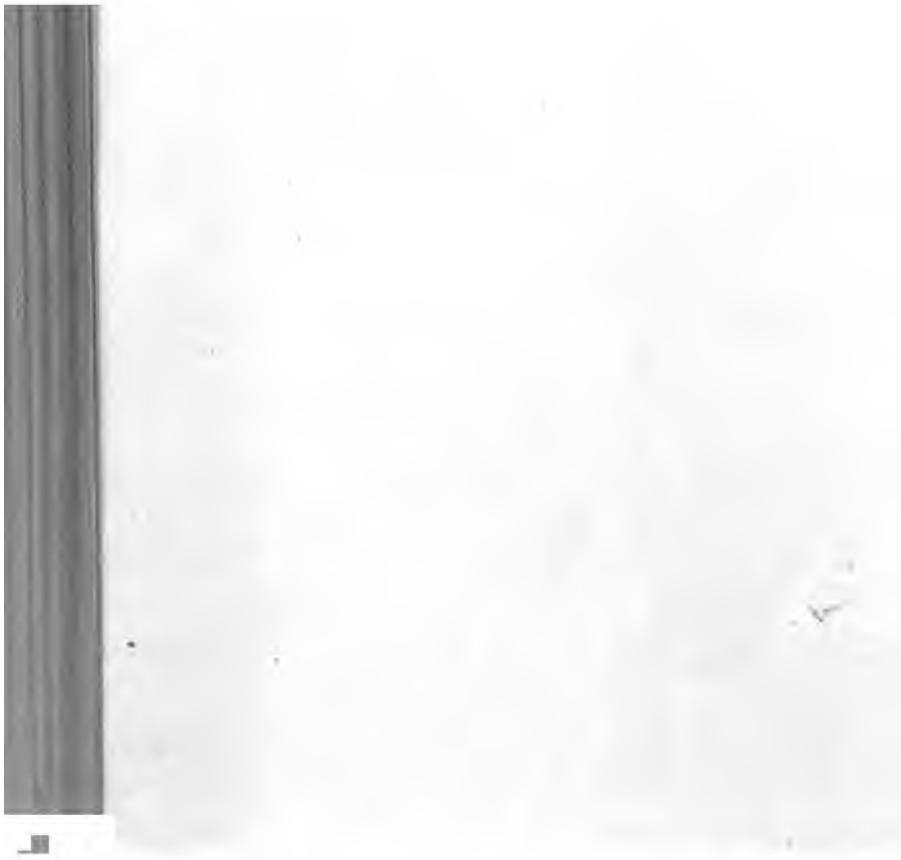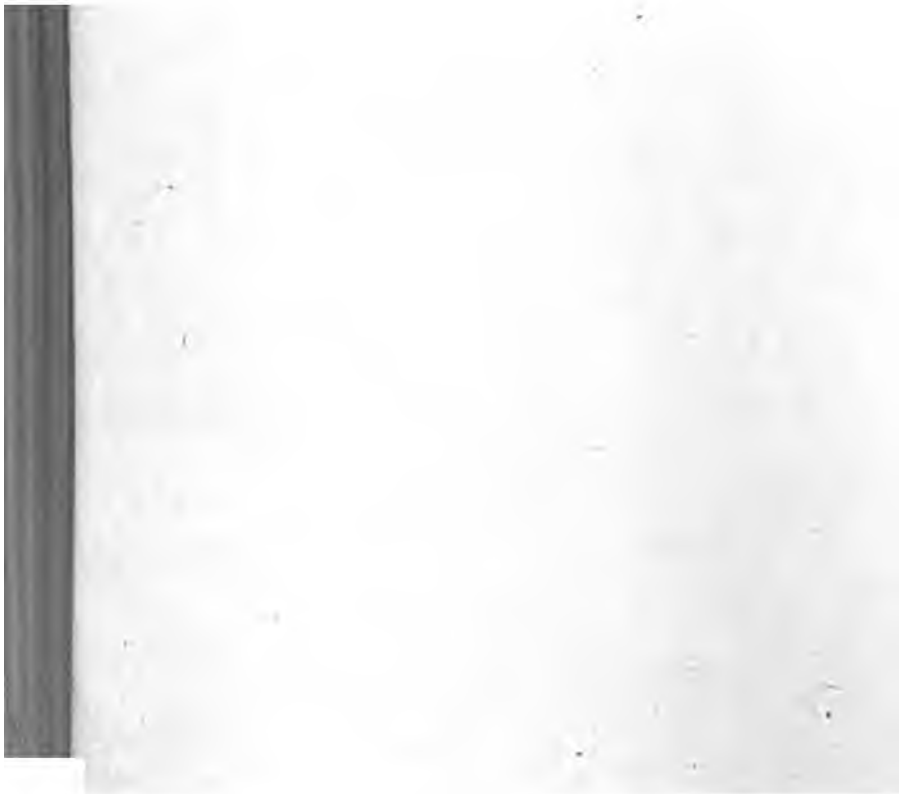
NOTE—The head-notes in each case were prepared by the Judge who delivered the opinion, as required by law.